PB-216 686

MODEL STATE HOUSING SOCIETIES LAW

Jan Krasnowiecki

Consumer Protection and Environmental Health Service
Washington, D. C.

1970

DISTRIBUTED BY:

NTIS

National Technical Information Service
U. S. DEPARTMENT OF COMMERCE
5285 Port Royal Road, Springfield Va. 22151

COMMUNITY ENVIRONMENTAL MANAGEMENT SERIES

PB 216 686

MODEL STATE HOUSING SOCIETIES LAW

HOUSING AND HYGIENE

COMMUNITY ORGANIZATION

ENVIRONMENTAL HEALTH PLANNING

Reproduced by
NATIONAL TECHNICAL INFORMATION SERVICE
U S Department of Commerce
Springfield VA 22151

U S DEPARTMENT OF HEALTH EDUCATION AND WELFARE
Public Health Service
Consumer Protection and Environmental Health Service
Environmental Control Administration

MODEL STATE HOUSING SOCIETIES LAW

Jan Krasnowiecki
Professor of Law
University of Pennsylvania

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Health Service
Consumer Protection and Environmental Health Service
Environmental Control Administration
Bureau of Community Environmental Management
1970

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C., 20402 - Price 35 cents

Public Health Service Publication No. 2025

FOREWORD

The intent of this legal research was to explore the feasibility of using, in built-up residential areas, some of the legal relationships used over the years by developers of new housing to motivate sound conservation of dwellings and reasonable modernization of their surrounding environment. Professor Krasnowiecki has considered alternate ways of bringing into being private groups from within residential neighborhoods of existing housing to develop motivation and means of potential private action to carry out concern for maintenance of environmental health and other standards. These groups would be legally capable of establishing individual and group rights and duties concerning both individual and common properties.

Presently, in areas of older housing, the isolated owner frequently resolves decisions regarding maintenance by waiting to see what others are going to do. This practice encourages the drift toward blight. The informal social pressures from neighbors are no longer present to motivate appropriate maintenance and modernization, in contrast to their influence in less mobile populations of 40 to 50 years ago. The only alternative now possible to this ineffective decision-making is intervention by the public through (1) inspection and code enforcement by the health department or other local authority; (2) through urban renewal programs; and (3) through receivership programs in scattered examples. Shortly after an area has been systematically inspected and brought up to a given level through code enforcement, the drift toward blight tends to start all over again, with resulting waste of both private and public expenditures. The present process requires repeated public code enforcement intervention every few years.

Participation in standards maintenance by private citizen groups can reduce the burden of public inter-

vention to gain and maintain a healthful environment. The present need is for development of private groups, here called Housing Societies, legally capable of effective decision-making regarding maintenance of health standards in dwellings and neighborhood environments. Such organized groups, legally empowered and representing all properties in an officially demarcated neighborhood, can act in conjunction with public authority to gain mutual consensus regarding levels of dwelling maintenance. They can further acquire and maintain common properties to improve the recreation and circulation patterns needed for a healthful and safe neighborhood environment.

This legal research and its recommended model instruments suggest means by which legal relationships and responsibilities of urban residents to each other may be worked out. It is hoped that state and local governments will use this series of concepts or tools in their planning for healthful and economic use of areas of existing housing.

Chris A. Hansen
Commissioner
Environmental Control Administration

PREFACE

The Model State Housing Societies Law was submitted on October 15, 1967, as part of a report representing research done for the U.S. Department of Health, Education, and Welfare, Public Health Service, under contract PH 86-66-177. The original submission included an introductory review and analysis of various existing techniques for coping with deteriorating urban neighborhoods, prepared by Russell J. Epprecht, Class of 1968, University of Pennsylvania Law School. Since the date of the report, a number of publications have appeared covering much the same ground as was covered by the introductory review: see, e.g. Housing for the Poor: Rights and Remedies, Project on Social Welfare Law, New York University School of Law (Supp. No. 1, 1967). Accordingly, the introductory review and analysis is omitted in this publication. The Model Law, which represents a new approach to the problem, is published in full with commentary as originally submitted. All of the relevant cases and statutory materials covered in the introductory review and analysis are included in the commentary to the Law.

I am much indebted to Mrs. Lynn Moore, Class of 1969, University of Pennsylvania Law School, for providing the useful summary of the Law included with this publication.

It should be noted that the pending Housing and Urban Development Act of 1968 (S. 3497 and HR. 17989, 90th Cong. 2d Sess.) offers new support for some of the proposals of the Model Law-particularly those described in the Comments to Article IV.

Finally, the reader's attention is directed to a related proposal that was published shortly after the Model Law was completed: Babcock and Bosselman, Citizen Participation: A Suburban Suggestion for Central City,

Symposium on Housing, Law and Contemporary Problems, 220 (1967).

JAN KRASNOWIECKI
University of Pennsylvania Law School
July 26, 1968

CONTENTS

Page

SUMMARY OF MODEL HOUSING SOCIETIES LAW..... 1

ARTICLE I

Section 100. Housing Societies..... 9
Section 101. Definitions..... 11
Section 102. Powers of a Housing Society..... 14
Section 103. Subsidiary Organizations..... 18
Section 104. Membership..... 19
Section 105. Voting Rights..... 21
Section 106. Board of Directors..... 23
Section 107. Assessments..... 26

ARTICLE II

Section 201. Organization: Articles, Bylaws, Exercise of Powers..... 31
Section 202. Adoption of Bylaws: Procedure in Case of Consenting Owners..... 32
Section 203. Adoption of Bylaws: Procedure in Case of Non-consenting Owners..... 33
Section 204. Additions to Member Properties..... 37
Section 205. Effect of Bylaws..... 38
Section 206. Objections to Bylaws: Action in Court..... 42
Section 207. Compensation..... 44
Section 208. Amendment of Bylaws 45

ARTICLE III

Section 301. Receivership: Grounds for Proceeding..... 47
Section 302. Notice: Time and Manner of Service..... 49
Section 304. Defenses: Burden of Proof..... 50
Section 305. Order Appointing Receiver..... 53
Section 306. Receivership Liens: Priorities: Application of Rents Thereto: Power to Borrow..... 53

Contents (Cont'd) Page

Section 307. Petition to Limit Priority of Mortgages.... 56
Section 308. Liability..... 57
Section 309. Accounting: Discharge of Receiver..... 57

ARTICLE IV

Section 401. Condominium [Horizontal] [Unit] Property Law: Applicability..... 59

SUMMARY OF MODEL HOUSING SOCIETIES LAW

by

Mrs. Lynn Moore, Class of 1969
University of Pennsylvania Law School

I. The Model State Housing Societies Law - Introduction

The Model State Housing Societies Law is designed to authorize and encourage the formation of neighborhood housing organizations to enforce housing standards, to provide regular exterior and major interior maintenance, to own and maintain common areas and facilities, and to sponsor new or rehabilitated housing (separately or in combination in existing neighborhoods) at low or moderate cost. The Housing Societies would be organized as non-profit corporations and would exercise their powers by means of their bylaws, which would be in the form of covenants running with the land, imposed on member properties.

The prototype of the Housing Society is to be found in the Property Owners' or Homes Association created by the developer of a residential subdivision. These associations generally enforce standards, provide maintenance, and provide such common properties and services as swimming pools, parks, trash collection, and snowplowing. The developer of a subdivision, however, can easily establish real covenants which impose maintenance assessments, payable to the association, against each lot he sells, because he is the common owner. In existing neighborhoods with diverse ownership, it is unlikely that every owner would consent to join even the most beneficial neighborhood conservation organization. The Model State Housing Societies Law is designed for use in existing urban neighborhoods where properties are diversely held, and it specifically provides for imposing its bylaws on the minority of non-consenting owners so that the entire

neighborhood can be regulated by the Society. The Housing Society can provide a continuity in neighborhood improvement that has not been obtainable through public code enforcement and rehabilitation.

The Housing Society is envisaged as the logical focal point for the receipt of government aid. As a non-profit corporation, the Society is authorized to sponsor government-assisted housing at low or moderate cost. The Society may retain ownership and rent or sell such housing (subject to its bylaws). It is hoped that Housing Societies will come to administer rehabilitation loans and grants and serve as an intermediary in obtaining government-insured, low-interest mortgages for its members.

The Housing Society involves both owners and tenants of its member properties, a unique feature that makes it particularly useful in new towns and in older urban neighborhoods where some housing is owner-occupied while other units are rented. By giving tenants, absentee owners, and owner-occupants a voice in the maintenance of property standards throughout the neighborhood, the disproportionate power of absentee landlords, which presently threatens older neighborhoods, can be avoided. The power of tenants within the Housing Society can achieve some of the advantages of a tenant union while stressing cooperation between owners and tenants rather than opposition.

2. Basic Features of the Housing Society

Article I outlines the basic features of the Housing Society. In addition to all powers of a non-profit corporation (to the extent that these are not inconsistent with the Model Housing Society Law) the Society is given a whole range of special powers by § 102. These special powers become effective upon the adoption of bylaws in the form of recorded covenants running with the land, pursuant to §§ 202-203. Through its bylaws, the Housing Society may reserve and exercise the special powers (here summarized):

(a) (1) to provide regular exterior and major interior maintenance.

(2) to prescribe health, safety and welfare standards for member properties. (This is similar to municipal codes, but has advantages in terms of enforcement because of its basis in a real covenant.)

(3) designate and assign responsibilities of owners and tenants.

(4) reserve easements of ingress and egress and

(5) the right to inspect (so as to meet, in part, the problem posed by Camara v. San Francisco. See Comment at p. 16).

(6) levy regular and special assessments against member properties. (Regular assessments are periodic assessments for regular maintenance provided by the Society. The Society is also authorized to levy special assessments against nonconforming properties to cover the cost of remedying violations of standards imposed by its bylaws.).

(b) provide common properties and services (such as trash collection).

(c) provide moderate and low-cost housing.

(d) serve as receiver.

(e) borrow money, buy or lease property, receive and administer government funds (as is noted in the Comment at p. 15, enforcement notice issued to an owner who cannot afford the improvement should be coordinated with available loan and grant assistance and such assistance should be administered on a neighborhood basis).

Most of these powers are modeled directly upon residential subdivision homes associations. The unique powers of (a)(3), (c), (d), and (e) relate especially to the problems of older urban neighborhoods which Housing Societies may help solve.

§ 103 provides for the creation of subsidiary organizations within the Housing Society to manage smaller groups of living units, including cooperative or condominium arrangements. Subsidiary organizations are designed to provide the flexibility needed where several types of housing are involved, such as apartment buildings and single-family houses. Problems of diverging interests within the larger Society can thus be handled by giving each type of housing or each group the desired autonomy through a subsidiary organization.

§ 104 provides that all owners and tenants of member properties and their immediate families residing with them, are members of the Housing Society, as well as of

any subsidiary organization governing their property. In addition to the major powers and regulations reserved in the recorded bylaws, the directors of the Society and of each subsidiary are given the power to adopt minor housekeeping rules. Violation is punishable by temporary suspension.

§ 105 grants rights to members as owners or tenants of living units under the following provisions:

(a) Each living unit has two votes within the Housing Society and also within any relevant subsidiary organization. If the unit is owner-occupied, the owner has two votes. If it is rented, the owner has one vote and the tenant has the other.

(b) The bylaws may also provide for two classes of voting membership – owners and tenants – either for the whole Society or within subsidiaries, and specify that for some issues a majority of both classes will be required for action.

As the Comment to this section suggests, the presence of any vacancies in rented units will give the owners a majority. However, it is expected that on many issues owner-occupants will vote with the tenants. More important perhaps is the balanced membership of the Board of Directors.

The Board of Directors, established pursuant to § 106, would consist of 3 to 12 members (in multiples of three), of whom not less than one-third would be appointed by the Mayor. The remaining positions could be filled either by direct election or by the Mayor's selection of directors from nominations made by the owners and tenants; the owners would be responsible for 1/3 of the Board, the tenants for 1/3. The provision for 1/3 of the Board to be representatives of tenant interests would not apply under subsection (b)(3) unless 1/3 or more of the total units within the Society (or the relevant subsidiary in the case of representation of the Board of a subsidiary) are tenant occupied.

The Comment to § 106 gives two reasons for requiring public representation on the Board of Directors: the public interest in the Societies' activities affecting neighborhood welfare, and the usefulness of the public Directors as arbiters in the case of disputes between landlords and tenants.

Public appointees on the Board would seem particularly useful in forcing the Housing Society to look outside its

own neighborhood in considering the wisdom of taking certain steps which, while furthering the interests of the members, might be adverse to the needs of the larger community.

Another significant function of these public Directors might be to provide technical competence and contacts in the worlds of finance, law, business and politics. As the *Homes Association Handbook* (Urban Land Institute, Tech. Bull. 50(1964)) points out, these talents are usually not found in indigenous community leaders except perhaps in upper-middle-class groups, but they are needed in accomplishing what a Housing Society seeks to do. In any event, the Mayor's selection of the public directors should be made carefully.

§ 107 allows the Housing Society or any of its subsidiaries to levy periodic assessments to cover regular maintenance and other services provided for member properties as well as special assessments against a property where the Society has stepped in to correct a violation. All assessments operate as liens on the land and buildings of the member properties as well as remaining the personal obligation of the owner. The owner may avoid personal liability by petitioning the court for the appointment of a receiver. See § 301(b). Such liens are to be superior to all other liens except those for taxes, municipal assessment, or a mortgage to finance the acquisition, construction or improvement of the property. § 107 provides for both automatic increase and change of the maximum assessment against each property.

3. Organizing the Housing Society

Article II sets up the procedure for organizing the Housing Society. The most significant difference between the Society as organized pursuant to this Article and the prototype Homes Association is the Society's power to compel non-consenting owners to subject their properties to the bylaws. Exercise of this power requires approval by City Council. Provision is made for compensating the non-consenting owners under an "inverse condemnation" procedure. This radical power of the Housing Society makes it feasible to assemble private property interest for concerted maintenance on a meaningful scale in existing, diversely-held neighborhoods.

§ 202 sets forth the procedure for the adoption of the bylaws when all of the owners consent by subscribing to them. These by-laws are to be recorded against the prop-

erties of the consenting owners as if they were easements in favor of the Housing Society, the owner as grantor. A tenant whose landlord consents to the recordation of the bylaws against his property has recourse solely against the landlord, although most tenants would not be adversely affected by the imposition of the bylaws. In fact, the Comment to this section, at p. 33 notes that "obligations imposed upon tenants in the Housing Society's bylaws are unlikely to exceed the minimum demanded by public code or already imposed by lease."

§ 203 deals with the critical process for adopting the bylaws in the case of non-consenting owners. When at least 60% of the owners of living units in the proposed member properties have consented by subscribing to the bylaws, the Housing Society may petition the local government to certify that the public interest would be served by the subjection of the remaining properties to the proposed bylaws. The petition may be referred to the planning commission for study; the planning commission may hold a public hearing before submitting its report. A public hearing must then be held by the local governing body. All owners of proposed member properties must be notified of this hearing. If the local governing body finds that the subjection of the properties of non-consenting owners to the proposed bylaws will serve the public health, welfare and safety it may certify this fact to the Housing Society, whereupon the Society is authorized to record the bylaws against such properties.

§ 203, § 206, which sets out tne court proceedings for objecting to the bylaws, and § 207, which provides compensation to owners whose property is subjected to the bylaws without their consent, are based on the combined authority of the State's police power and its power of eminent domain. They are modelled after the provisions of the Illinois Neighborhood Redevelopment Corporation Law, Ill. Stat. Ann. ch 67 1/2 §§ 251-292 (esp. § 292) (1965) and the Pennsylvania Eminent Domain Code of 1964, Pa. Stat. Ann. Title 26, §§ 1-101 - 1-903 (Supp. 1966). Compensation is provided when the power exercised becomes a "taking;" if the power is within the police power regulation delegated to the local government there is no compensation. Compensation proceedings are to be governed by the state's eminent domain law, although the state does not need to institute condemnation proceedings against the non-consenting owner, since the action of recording the bylaws is presumptively regulatory in nature. The owner, however, is given the right to claim compensation if he can estab-

lish a ''taking'' and he may challenge the imposition as an excess of power. See Comment to § 205, at p. 40.

§ 204 provides for the extension of the bylaws to member properties acquired after the original organization of the Society.

§ 205 discusses the effect of the bylaws when recorded against member properties. Being covenants that run with the land, they become binding on present and future owners and tenants. This section explicitly states that affirmative as well as negative obligations imposed by the bylaws are enforceable real covenants, thus obviating any common-law uncertainties about the nature of affirmative covenants. (See Comment at p. 39; *Homes Association Handbook* §§ 23.1-23.9).

§ 208 makes liberal provision for amendment of the bylaws by agreement of 60% of the owners, with the consent of the local government. In addition, courts may review the bylaws (as any real covenants) to remove outdated provisions.

4. Receivership of Member Properties

Article III deals with the function of the Housing Society in receivership proceedings against any member properties. § 301 authorizes the Society or any of its subsidiaries to petition the court for the appointment of a receiver for any multifamily building or any rented living unit where ''the owner has failed to provide adequate living conditions therein.'' Receivership is used here as one of several remedies to allow the Housing Society to conserve and improve the neighborhood. § 301 is broader in scope than most existing receivership statutes, which provide only for multifamily buildings or only for multifamily buildings where a significant portion of the tenants institute a rent strike, or allow receivership proceedings only where instituted by a public official. See Comment at pp. 48. §§ 302-309 outline specifically the proceeding for appointment of a receiver, the defenses available to the owner, the effect of the receivership liens, granting the receiver the power to borrow money, a provision to limit the priority of mortgages, and termination of the receivership.

The court order appointing the receiver is recorded as a continuing lien in the nature of an easement granted by the owner to the receiver. Under § 306, this lien is superior to all prior or subsequent liens except liens for

taxes, municipal assessments, and (subject to § 307), the lien of any mortgage financing the acquisition, construction or improvement of the land or buildings involved. § 306(b) requires the application of rents first to the payment of taxes, municipal assessments and mortgages and second to expenditures made by the receiver.

At the present time the validity of statutes subordinating mortgages to the receivership lien is in doubt (see Comment, at pp. 55). This doubt, however, is not advanced as a reason for § 306. Rather, § 306 reflects the thought that the subordination of mortgages may result in greater scarcity of legitimate mortgage credit for deteriorating areas. This is critical, since the Model Housing Societies Law is designed to encourage and indeed demands the availability of adequate financing. § 307 provides for the limitation of mortgage priorities "if the court is satisfied that the return which the mortgage has contracted for or which [the mortgagee] has already received upon the loan (including service charges and discounts) is unreasonable...." at p. 56. Read together, § 306 and § 307 encourage the legitimate lender to participate in the improvement of old neighborhoods and discourage the unscrupulous practices of "loan sharks." See Comment, at pp. 56.

5. Condominiums and the Housing Society

Article IV explains the applicability of condominium law to the Housing Society and its member properties. In addition to providing that condominium units are to be governed by a subsidiary organization of the Housing Society, § 401(b) makes condominium law applicable to detached, semi-detached and attached as well as the multifamily structures more traditionally subjected to the condominium regime. This section stresses that in the case of detached, semi-detached or attached housing each individual unit may carry with it a fee simple title to the land subject to easements for maintenance. This proposal is based on Krasnowiecki, Use of Condominium for Low Cost Housing, XVIII Virginia Law Weekly, 3/3/66. § 401 further specifies that the Housing Societies Law shall govern where its provisions conflict with existing condominium legislation.

ARTICLE I

SECTION 100. HOUSING SOCIETIES. A corporation not for profit may be formed for the purpose of maintaining and improving the living conditions within a described area. The corporation shall be known as a Housing Society. Housing Societies shall be governed by this act and, to the extent not inconsistent with the provisions of this act, by [refer to appropriate non-profit corporation law of the state].

Comment to Section 100.

This model law, designed for adoption by the states, would authorize formation of neighborhood organizations to enforce housing standards, provide certain kinds of exterior and interior maintenance and serve as sponsor or owner of moderate and low cost housing projects.

With the exception of the powers which it may exercise in its proprietary capacity (as sponsor or owner of a project) the powers and functions of the Housing Society within a neighborhood will rest on bylaws couched in the form of covenants running with the land recorded against each participating property. See Sections 102(a), 201, 202 and 203. In this respect, the Housing Society is modeled upon a concept of private neighborhood maintenance organization which has been extremely successful in residential development for over a century: Homes Association Handbook, Urban Land Institute, Tech. Bull. 50 (1964).

Efforts at neighborhood conservation and improvement undertaken under public codes and through public initiative have met with ambivalent success. Public intervention has, by and large, proved incapable of fostering the neighborhood spirit and personal in-

volvement which is essential to success of any neighborhood improvement venture. The current approach to neighborhood conservation and renewal is highly episodic in character. Even in areas designated for concentrated code enforcement, nothing is provided to assure continuity in the level of maintenance produced by the initial flurry of enforcement orders, fines and related financial assistance. Similarly, existing urban renewal programs rely upon the renewal and rehabilitation work itself, for continuity in effect.

The Housing Society is designed to provide a basis for continuing neighborhood involvement in maintenance and enforcement of standards. A private organization whose powers and functions rest on covenants running with the land, can be given a whole range of powers and functions not available to public officials. It can be given the power and can be charged with the obligation to provide certain kinds of exterior and interior maintenance on all participating housing units. The maintenance can be financed out of assessments levied by the Society against each participating property. See Section 107. To the extent that a neighborhood cannot sustain the cost of its own improvement and conservation, the Housing Society would be a logical focal point for the receipt and disbursement of various kinds of government housing grants and loans in favor of participating properties. See Section 102(e). Since the relevant housing standards will be set forth in covenants, a whole range of civil remedies will become available to the Housing Society for their enforcement. See Section 205.

All of these features of the Housing Society will be discussed in greater detail under the specific Sections of this Act. There is, however, one significant difference between the Housing Society and the homes associations upon which the Society is modeled. With a few exceptions, homes associations are brought into being by the original developer of the project. The covenants are imposed against all of the properties in the project by the developer, as common owner, before any of the properties are sold or leased. The Housing Society, on the other hand, will have to secure its covenants against properties which are already in diverse ownership. Clearly, the Housing Society cannot look forward to success unless a substantial majority of the affected property owners are

willing to join the Society and execute the necessary covenants. Even though a substantial majority may be willing to subscribe to the covenants, the success of the Housing Society can be threatened by pockets of non-consenting properties within the neighborhood. This Act provides a procedure by means of which the covenants can be extended to the non-consenting properties. See Sections 203, 206, and 207.

SECTION 101. DEFINITIONS. **Whenever used in this act, or in any articles or bylaws adopted pursuant to this act, unless otherwise specified or the context prohibits, the following words shall have the following meaning:**

(a) ''Common property'' shall mean and refer to any property owned or maintained by the Housing Society or any of its subsidiary organizations for the common use, benefit or enjoyment of its members.

(b) ''Living unit'' shall mean and refer to any portion of a building designed for use and occupancy as a residence by a single family.

(c) ''Member property'' shall mean and refer to any property which is subject to the bylaws of a Housing Society.

(d) ''Multifamily building'' shall mean and refer to a building containing two or more living units under a common roof except when each such living unit is situated upon its own individual lot.

(e) ''Owner'' shall mean and refer to the record owner, whether one or more persons or entities, of a fee interest in property including a condominium [horizontal property] interest and to the owner, whether one or more persons or entities, of a proprietary lease or other possessory interest in a cooperative, but shall not mean or refer to a mortgagee or lienholder unless and until he takes possession of the property by foreclosure or any other proceeding in lieu of foreclosure.

(f) ''Tenant'' shall mean and refer to every person obligated upon a lease, whether written or oral, of any member property.

Comment to Section 101.

Subsection (a). It is envisaged that the Housing Society itself, or through its subsidiaries (Section

103), may own and maintain various common properties, such as play-lots, parks, playgrounds, swimming pools and other recreational and social facilities. Section 102(b) and (d). In addition, as sponsor of low or moderate cost projects (Section 102c)) it may itself, or through its subsidiary for that project, provide continued maintenance of common facilities including (in the case of a condominium, Section 401) maintenance of all common portions of a building. Accordingly, "common properties" is broadly defined in this Subsection to include any property owned or maintained by the Society or any of its subsidiaries for the common use, benefit or enjoyment of its members.

Subsection (b). The main purpose of this definition is to control the voting rights as set forth in Section 105. Under Section 105, two votes are allocated to every living unit to be cast by its owner and tenants, if any, as therein provided. The intention of this Subsection is to define "living unit" in *physical terms* as a unit *designed* for occupancy by a single family regardless of who, in fact, occupies the unit. It is not the purpose of this definition to control the occupancy of any such units. The Housing Society, however, is authorized to adopt its own requirements or those of a local housing code on this issue: Section 102(a) (2).

Subsection (c). Under Section 201(b), the powers of the Housing Society do not become effective until bylaws are adopted and recorded against the properties described therein. This definition makes clear that member properties are those against which bylaws have been recorded. Thereafter, all powers, rights and obligations of the Society, its subsidiaries and its members are related to "member properties." For example, members of the Society are those who are owners (defined in subsection (e)) and tenants (defined in subsection (f)) of a member property. Section 104.

Subsection (d). This standard definition of "multi-family building" excludes the single family town house, even though under a common roof.

Subsection (e). All owners and tenants of member properties are members of the Housing Society. Section 104. Owners are differentiated from tenants, however, for the following purposes: voting (Section 105); consent to recordation of bylaws (Sections 202 and 203);

obligation to pay maintenance assessments (Section 107). By excluding the mortgagee until such time as he takes possession of the property at foreclosure or any proceeding in lieu of foreclosure, the definition makes clear that the mortgage lender does not have any personal obligation on assessments levied by the Housing Society. At the same time, however, the mortgage lender is excluded from the list of owners who must give their consent to the recordation of the bylaws under Section 202 and from the list of owners who must be given notice of a proceeding to record the bylaws under Section 203. The reason for this is that the bylaws cannot directly impair the mortgage lender's security. Although the bylaws can give to the Society a power to levy assessments for regular maintenance and special assessments for work undertaken by the Society to cure a violation of housing and health standards imposed by the bylaws, the lien of these assessments is expressly postponed to the mortgage, Section 107(d). The position taken in this Act is that the mortgage lender is not entitled to any protection beyond the assurance that maintenance costs built up prior to foreclosure will not come ahead of his loan. It is unlikely that subjection of the mortgaged property to the Housing Society regime will depress its value. Should this result, however, the consequent loss to the lender is either attributable to the voluntary action of the borrower (under Section 202) or to a finding by the local legislative body that the regime will promote the public health, safety and welfare (Section 203). In the former case, the lender's recourse should be against his borrower. In the latter, the lender should be given no more protection than he now has against public regulation of his borrower's property. Further discussion of this point will be found under the specific sections involved.

Subsection (f). The definition of tenant is not designed to control occupancy. Its sole purpose is to describe those who are automatically entitled to membership in the Society (Section 104) to exercise voting rights (Section 105) and to representation on the board of directors (Section 106 (b) (3)). Section 104 extends membership rights (other than voting rights) to the immediate family of any member residing with him, so that the definition used in this Subsection does not limit enjoyment of common properties to those tenants whose names appear on a lease.

SECTION 102. POWERS OF A HOUSING SOCIETY. In addition to all other powers vested in it by law, a Housing Society shall have the power to:

(a) Adopt bylaws in the form of covenants running with the land and to record them against the land so as to bind consenting and non-consenting owners and tenants as further provided in this act. Pursuant to its bylaws, the Housing Society may:

(1) Reserve the right and assume the obligation regularly to provide all or certain kinds of exterior and interior maintenance (including replacements) upon member properties hereinafter referred to as "regular maintenance."

(2) Prescribe standards and requirements for the health, safety and welfare of its members relating to maintenance, repair and improvement of the structure, interior and exterior of buildings and the provision of utilities and services, sanitary facilities and adequate light and air. In the exercise of this power, the Housing Society may incorporate by reference or repeat in its bylaws any and all provisions of any public code or regulation applicable to the member properties together with any future amendments thereto.

(3) Designate and assign the responsibilities of owners and tenants in regard to the standards and requirements prescribed under the preceding paragraph.

(4) Reserve easements of ingress, and egress, exerciseable at reasonable hours, for the purpose of carrying out regular maintenance.

(5) Reserve the right to inspect all member properties at reasonable hours to determine whether the property is in compliance with the bylaws and the right to enter upon the property to correct the violations. The bylaws may provide that owners who have consented to the bylaws as provided in Section 202 thereby also consent to inspection at regular intervals (of not less than three months) and to entry for the purpose of correcting violations.

(6) Levy regular and special assessments against member properties as provided in Section 207.

(b) Provide and maintain common properties and provide services such as trash collection and street cleaning.

(c) Provide moderate and low cost housing, whether through new construction or rehabilitation.

(d) Serve as receiver or institute receivership proceedings pursuant to Article III and may purchase any property in a proceeding to foreclose a receivership lien or any proceeding in lieu of foreclosure.

(e) And in furtherance of its powers, may own, buy, sell, lease, manage and mortgage real property, borrow and lend money, enter into agreements including, but not limited to, agreements with federal, state and municipal governments or government agencies for the purpose of receiving and administering grants and loans for the benefit of owners and tenants of member properties.

Comment to Section 102.

See comment to Section 100 for general introduction. Under Section 100, the Housing Society has all of the powers of a non-profit corporation to the extent not inconsistent with the provisions of this Act.

Subsection (a). This subsection lists the powers which the Housing Society can exercise over member properties. These powers must be set forth in bylaws in the form of covenants running with the land. The bylaws must be adopted and recorded as provided in Sections 202 and 203. Section 201(b) provides that the powers of the Housing Society over member properties do not become effective until the bylaws have been adopted and recorded as provided in Sections 202 and 203. Under Section 104, the Housing Society may reserve to its board of directors or to that of any of its subsidiaries the power to promulgate reasonable housekeeping rules as in the case of cooperatives: See Rohan, Cooperative Housing: An Appraisal of Residential Controls, 18 Stanf. L. Rev. 1323 (1966).

Subsection (a)(1) authorizes the Housing Society to reserve the right and to undertake the obligation to provide certain kinds of exterior and interior maintenance on a regular basis. The bylaws may provide for easements of ingress and egress, exerciseable at reasonable hours, for the purpose of carrying out

regular maintenance. Subsection (a)(4). Such rights are commonly reserved by homes associations and condominium. It is believed that a reasonable exercise of such rights by the Housing Society does not fall within the scope of the principle announced in Camara v. San Francisco. 387 U.S. 523, 87S.Ct. 1727 (1967) even when applied to properties which have not consented to the imposition of the bylaws (see Section 203). The right to undertake certain kinds of exterior and interior maintenance on a *regular basis* constitutes a proprietary right and the non-consenting property owners are given the opportunity to claim compensation for its reservation by the Housing Society (Section 207) as well as the opportunity to challenge the reservation as an excess of power (Section 206).

In this regard, the standards and requirements prescribed by the Housing Society under Subsection (a)(2) and (3) are distinguishable. This is an exercise of regulatory power. Although the Housing Society is a private organization, its power to regulate non-consenting properties under Subsections (a)(2) and (3) is derived through a procedure which involves public action (Section 203).

Entry for the purpose of determining the existence of violations of standards and requirements imposed under Subsection (a)(2) may come within the principle of Camara. Discovery of a violation may result in a civil proceeding under Section 205 in equity to enforce the covenant contained in the bylaws by injunction. The Housing Society may reserve the right to enter upon the property to correct the violation, Subsection (a)(5). Unlike in the case of regular maintenance covered by Subsection (a)(1), the cost of correcting a violation is chargeable against the non-complying property (Section 107(b) and (c)) rather than against the general maintenance fund produced by periodic assessments under Section 107(a). Finally, a non-complying property may be put in receivership, Section 301. The principle of Camara is not limited to inspections which result in criminal proceedings. Subsection (a)(1) authorizes the Housing Society to reserve the right to inspect all member properties. It remains uncertain, however, whether the Housing Society will be allowed to predicate further action (to correct a violation) on an inspection which is not supported by a warrant or a court order. In any event,

an owner's refusal to permit entry or to pay any fine levied by the Society will require further action in court. Subsection (a)(5) specifically provides that the bylaws may contain a waiver of any rights against regular inspections by consenting owners (as defined in Section 202). Furthermore, in the case of rental properties, consent to inspection may be obtained from the tenants: see State v. Schaffel 4 Conn. Cir 234, 229 A. 2d 552 (1966); White, Effective Consent to Search and Seizure, 113 U. Pa. L. Rev. 260 (1964).

As already noted, Subsections (a)(2) and (3) authorize the Housing Society to impose, through its bylaws, the equivalent of public health and housing code requirements upon its member properties. As noted in the comment to Section 100, the advantage of this approach, which would make the requirements run with the land as covenants, lies in the mode of enforcement-by civil proceedings-and in the fact that enforcement becomes a neighborhood responsibility.

Subsection (b). This Subsection, together with Subsection (e) authorizes the Housing Society to own and maintain common properties and to provide various services such as trash collection and street cleaning. Maintenance is financed out of periodic assessments, Section 107. It should be noted that the Housing Society may organize individual multifamily buildings and groups of houses together with related common properties into subsidiary corporations. Section 103.

Subsection (c). Specifically authorizes the Housing Society to act as sponsor and owner of low and moderate cost housing projects. If not already included within the Society, project properties can be brought into the Society under Section 204.

Subsection (d). The intent of this Act is to give to the Housing Society a complete range of powers and remedies for the preservation of housing standards and for the maintenance and improvement of the neighborhood. Accordingly, Article III, authorizes proceedings to put any multifamily or group of rental buildings into receivership. Under this Subsection, the Housing Society is authorized to serve as receiver and to acquire the buildings at any lien foreclosure sale.

Subsection (e). As stated in the comment to Section 100, the concept of the Housing Society is to provide

a private, neighborhood, vehicle for enforcement of housing standards, maintenance and improvement. One of the great disadvantages of the current approach to the problem is that enforcement and improvement work are disassociated with the financial aid available from various government sources. The Housing Society should become the focal point for the administration of government loan and grant programs. An enforcement notice issued to an owner who cannot afford the improvement should be coordinated with available loan and grant assistance and such assistance should be administered on a neighborhood basis. This Subsection authorizes the Housing Society to receive and administer any available government aid.

SECTION 103. SUBSIDIARY ORGANIZATIONS. The bylaws of the Housing Society may:

(a) Provide as to any multifamily building or group of living units and related common properties that such building or group of living units and related common properties shall be governed by a subsidiary organization with its own membership and board of directors, but all of the provisions of this act relating to the powers, duties, membership and voting rights of the Housing Society shall be applicable to each of its subsidiaries.

(b) Limit the functions delegated to the subsidiary organization and may provide that on the occurrence of certain specified events the subsidiary organization may forfeit its autonomy. But no such forfeiture shall become effective except after a hearing at which the members of the subsidiary organization shall be given an opportunity to present their views.

Comment to Section 103.

The purpose of this Section is to provide for flexibility of organization so that different kinds of housing can be accommodated within the Housing Society. The arrangement proposed in this Section and Sections 104 through 106 is patterned after that used in several successful homes associations, where different housing types are involved. It is obvious, for example, that an apartment building cannot be thrown in with single family detached or attached, owner occupied, housing to share all common facilities and to be governed by a single board of directors. Al-

though different housing types, with a different ownership and occupancy pattern, have successfully participated within a broader, overall, organization, it is imperative that each type of housing and related groups of housing be given a certain autonomy within the broader organization.

Subsection (a). This subsection authorizes creation of subsidiary organizations within the Housing Society. It should be read together with the provisions of Sections 104 through 106 relating to membership, voting rights and board of directors for an understanding of the relationship which is created between the Society and its subsidiaries.

Subsection (b). This Subsection authorizes the Housing Society, as parent corporation, to reserve supervisory powers over its subsidiaries. The bylaws of the Housing Society, in this regard, could well follow the pattern set by the F.H.A. in reserving power to take over control of its 213 Cooperatives in the event of substantial failure to meet the requirements of its regulatory agreement. Forfeiture of autonomy cannot involve imposition of new obligations or restraints on the owners and tenants of the subsidiary, since these are set by the bylaws. Essentially, forfeiture of autonomy under this subsection would mean displacement of the subsidiary board of directors.

SECTION 104. MEMBERSHIP. All owners and tenants of a member property and their immediate family who are residing with them shall be members of the Housing Society. In addition, all owners and tenants of a member property which is governed by a subsidiary organization and their immediate family who are residing with them shall be members of the subsidiary organization. The bylaws of the Housing Society may reserve to the board of directors of the Housing Society or of a subsidiary the power:

(a) To make reasonable rules and regulations governing the use and enjoyment of any member properties and adopt a reasonable schedule of fines for infraction of such rules.

(b) To suspend the membership rights of any member who is in violation of the bylaws or any reasonable rules and regulations adopted pursuant to subsection (a) until such violation is cured or as a penalty for a violation, but in the latter case for not more than

sixty days. This provision shall not affect the right of the Housing Society or of any subsidiary to institute any lawful proceeding to terminate the rights of any member as an owner or tenant.

Comment to Section 104.

By this Section all ''owners'' and ''tenants'' (as defined in Section 101(e) and (f)) of a ''member property'' (as defined in Section 101(c)) are automatically members of the Housing Society. In addition, owners and tenants of any member property which is governed by a subsidiary, pursuant to Section 103, are automatically members of the subsidiary. Membership as defined here controls the right to enjoy the facilities and services of the Housing Society or its subsidiaries. For this reason, the definition includes immediate family who are residing with a member. Under Section 105 voting rights are exerciseable by members, the number of votes is not related to the number of members, but rather to each living unit (as defined in Section 101(b). The reason for this arrangement is explained in the comment to Section 105.

Subsection (a). This Subsection allows the Housing Society to reserve to its board of directors, or to the board of any subsidiary, the right to make reasonable rules and regulations governing the use and enjoyment of any member properties.

Obviously, the organization must have power to adopt rules, such as those relating to pets, use of washing machines, use of common properties, noise and various other housekeeping rules. Such detail of daily administration cannot be committed to a more or less permanent set of bylaws recorded as covenants running with the land.

Subsection (b). This Subsection authorizes the Housing Society and its subsidiaries to enforce the bylaws and the rules adopted under Subsection (a) by suspension of membership rights (which would include enjoyment of common facilities and services and voting) until such violation is cured or as a penalty for a violation, but in the latter case for not more than sixty days. Experience with cooperatives and homes associations shows that the courts will police the exercise of the powers reserved under Subsection (a) and (b). See: Development in the Law-Judicial Control of Actions of Private Association, 76 Harv.

L. Rev. 983, 1032 (1965); Rohan, Cooperative Housing: An Appraisal of Residential Controls, 18 Stanf. L. Rev. 1323 (1966).

Under Section 102(c) the Housing Society itself or through its subsidiaries can act as a sponsor and owner of low and moderate cost housing projects. These may be rental, cooperative or condominium (see Section 401). In such projects, the Housing Society or any of its subsidiaries may have a right to terminate leases as landlord. Similarly as governing organization for a condominium, the Housing Society (or more likely a subsidiary) may have the right to terminate the owner's rights by foreclosing the lien of unpaid assessments-indeed, it may terminate any owner's right by foreclosure of liens for unpaid assessments. The last sentence of Subsection (b) is designed to make clear that the powers granted under this subsection are in addition to such other rights as it can assert against members in its proprietary capacity or through foreclosure of liens.

SECTION 105. VOTING RIGHTS. The members of the Housing Society and of any of its subsidiaries shall have no votes except as owners and tenants of a living unit:

(a) Each living unit in a member property shall have two votes both within the Housing Society and, in the case such property is governed by a subsidiary organization, within such subsidiary organization. If the living unit is occupied by a tenant, one of the two votes shall be exercised by the tenant, the other by the owner. If a living unit has more than one owner or more than one tenant, the votes allowable to each group shall be cast as each group determines among itself.

(b) The bylaws of the Housing Society may, for itself, or for its subsidiaries, provide for two classes of voting membership, the tenant class and the owner class, and may provide that on some issues the assent of a specified majority of both classes of voting membership is required for action. Nothing stated herein shall be read to deny to either class of voting membership the right to vote on any issue on which the other class is entitled to a vote.

(c) In case of any subsidiary organization, the bylaws of the Housing Society may provide that the votes of the members of the Housing Society who are

members of the subsidiary shall be exercised within the Housing Society by representatives elected by each voting group, owner and tenant members of the subsidiary, and that the votes allowable to each group shall be cast by their elected representatives as one block.

Comment to Section 105.

Under this Section voting rights are exerciseable by members only as tenants and owners of a living unit in a member property. This means that votes must be cast by persons who are ''owners'' and ''tenants'' as defined in Section 101(e) and (f). Furthermore, the number of votes available to either group is related to the living unit (as defined in Section 101(b)) not to the number of owners and tenants.

Subsection (a). Subsection (a) allocates two votes to each living unit in a member property. If the member property is governed by a subsidiary organization (Section 103), each living unit within it has four votes, two exerciseable within the subsidiary and two within the Housing Society. If a unit is not occupied by a tenant, the votes allocated to it can be cast by the owner. If the living unit is occupied by a tenant, one of the two votes is available to the owner, the other is available to the tenant. If there are several owners or tenants of a living unit, the votes allocated to each group is cast as each group decides between themselves.

It is believed that the voting arrangement proposed in this Subsection is workable and represents the fairest solution of the problem of owner and tenant representation on any matter which requires membership vote. The arrangement should be read in the light of Section 106 which controls representation on the board of directors.

Taking a single apartment building, it is true, if there are any vacancies, that the owner can always muster a majority, since he can cast two votes for every vacant unit. It is true also that the owner will cast his votes in a block, whereas the tenants must combine their individual efforts to match him. However, where different types of property are included in the Housing Society, for example, when an apartment is included within a neighborhood which is largely owner occupied, one may expect the owner occupants to side with the tenants on any of their demands for

adequate maintenance. The same may be expected from owners of adjoining apartments, if their properties are properly maintained. Furthermore, the provisions of Section 106, relating to representation on the board of directors, are designed to redress any imbalance which may exist in this regard.

Subsection (b). This subsection authorizes adoption of bylaw provisions which would, in effect, give each group of voters, owners and tenants, a veto power over the action of the other on specific issues. The function of the two class voting provision is discussed in *Homes Association Handbook*, Urban Land Institute, Tech. Bull. 50, at p. 386 (1964).

Consider a Housing Society which includes both owner occupied housing and rental housing. A simple provision authorizing increase in assessments by vote of the majority of the members may be disastrous to the landlord since the owner occupant votes, when added to the tenant votes could completely outweigh the landlord votes. In such a case, the bylaws might well separate the owner and tenant votes or the landlord votes and place each in a different class, requiring the assent of each class for action. Subsection (b) makes clear that the division of voting into classes cannot be used to authorize unilateral action by any one class. Rather, the purpose of the two-class voting mechanism is to give each class protection against unilateral action by the other.

Subsection (c). Subsection (c) recognizes that where a Housing Society is composed of a substantial number of properties, direct voting within the larger Society might become unduly cumbersome. This Subsection authorizes provisions for representative voting such as has been successfully worked out in a number of the larger new town projects. Direct voting, of course, would still be mandatory within any subsidiary organization.

SECTION 106. BOARD OF DIRECTORS. The affairs of the Housing Society and of each subsidiary shall be managed by a board of directors.

(a) The initial board of the Housing Society may be any persons not less than three. The initial board shall hold office until the bylaws have been adopted and recorded as provided in Article II and thereafter for a period of not more than three months until the

election or appointment of their successors. The provisions of Subsection (b) relating to number, tenure and qualifications for office of the directors shall not apply to the initial board of the Housing Society.

(b) The regular board of directors of the Housing Society and each of its subsidiaries shall number any multiple of three but not more than twelve. The bylaws of the Housing Society shall set forth the number, terms of office (which may be staggered) qualifications and method of selection of each board, provided that:

(1) Not less than a third of each board outstanding at any time shall be appointed by [the Mayor].

(2) Not less than a third of each board outstanding at any time shall be appointed by [the Mayor] from a slate of nominees submitted by owner members (acting through an elected committee) or shall be elected directly by owner members;

(3) Not less than a third of each board outstanding at any time shall be appointed by [the Mayor] from a slate of nominees submitted by tenant members (acting through an elected committee) or shall be elected directly by tenant members. But the provisions of this subsection shall not apply unless the tenant members occupy, in the case of representation on the board of the Housing Society, a third or more of the living units existing in all member properties of the Society, and in the case of representation on the board of any subsidiary, a third or more of the living units governed by such subsidiary.

Comment to Section 106.

Subsection (a). Under Section 201 any three persons may incorporate a Housing Society and serve as its initial board of directors. The Housing Society does not acquire any powers over neighborhood properties until its bylaws have been adopted and recorded against such properties as provided in Sections 202 and 203. (see Section 201(b)). Since consent of a substantial majority (60%) of the owners in the neighborhood must be obtained before any further steps can be taken to record the bylaws (Section 203), there is no reason why the initial board should be limited in any way. This Subsection requires, however, that the initial board step down within three months of the recordation of the bylaws in favor of a regular board chosen as provided in Subsection (b).

Subsection (b). This Subsection is designed to control the representation of the interests of owners, tenants, and the public on the board of the Housing Society and of its subsidiaries. The number of directors must be three or any multiple of three, but not more than twelve. One third of the board outstanding at any time is appointed by the chief executive of the local government. Two reasons exist for demanding such public representation on the board:

(1) The activities of the Housing Society affect the public interest. Furthermore, if the Housing Society has employed the procedure authorized in Section 203 for recording its bylaws against non-consenting properties, there will be direct public involvement at the recordation stage.

(2) If the Housing Society or any of its subsidiaries contain a substantial number of rented units, the public appointees to the board can serve as arbiters of the conflicting interests of landlords and tenants.

Following these thoughts, Subsections (b)(2) and (b)(3) allocate one third representation to each of the two groups, owners and tenants. Subsection (b)(3), however, contains a limitation on this requirement which is designed to cover the cases in which the Housing Society or any subsidiary is composed predominantly of owner-occupied housing. For example, when the Housing Society or a subsidiary is composed of single family detached or attached housing where only a few units are rented, it would be absurd to give one-third representation to the tenants. The position taken in this Subsection is that if more than two thirds of living units are owner occupied, it is unlikely that the owner occupants would side with the landlords against the interests of tenants. Even if all of the rented units are owned by a single landlord, his block vote would represent a very small proportion of the total vote (in view of the fact that his tenants can cast one of the two votes available to each unit and the remaining owner occupants can cast two votes each). At the point where a third or more of the total living units included in the Housing Society, or of any subsidiary, is rented, the requirement of a third representation on the board of the Society or of the subsidiary, as the case may be, becomes applicable.

SECTION 107. ASSESSMENTS. The bylaws of the Housing Society may reserve to itself or to any of its subsidiaries the right to levy periodic assessments for regular maintenance and special assessments as hereinafter provided:

(a) Periodic assessments may be levied in amounts and on dates (annually or at lesser intervals) specified in the bylaws to cover the cost of regular maintenance undertaken by the Housing Society or its subsidiaries on member properties and the cost of regular services furnished member properties. The maximum amount of the assessment shall be specified in dollar amount or by a formula readily convertible to a dollar amount and shall be reasonably related, as to each member property, to the benefit derived therefrom. The maximum amount of the assessment specified in the bylaws shall be subject to automatic increase, in accordance with a formula set forth in the bylaws reflecting the increase in the cost of the maintenance and services provided. In addition, the bylaws may provide that the maximum shall be subject to change with the assent of a specified majority of the votes available to the properties which are affected. If the necessary assent is not forthcoming, the board of directors may petition the court of [insert court of appropriate jurisdiction] for an order directing the assessment to be raised on the ground that the present assessment is insufficient to fulfill the purpose of the organization.

(b) Special assessments may be levied against any property upon which the Housing Society or its subsidiary, after notice and opportunity to correct the same has been given to the owner, has corrected a violation of its bylaws pursuant to a power reserved therein.

(c) All assessments, regular and special, shall be a charge and a continuing lien on the land and buildings against which it is made as well as a personal obligation of the owner. But in the case of a special assessment, the owner may petition the court of [insert the court of appropriate jurisdiction] for an order requiring contribution thereto from tenants who are responsible for the violation or the Housing Society and its subsidiary may levy the assessment against such tenants directly.

(d) The lien of any assessment shall be superior to all other liens now or hereafter placed upon the member

properties except liens for taxes and municipal assessments and the lien of any mortgage given to finance the acquisition, construction or improvement of any land or buildings, but this exception shall apply only to assessments which have become due and payable prior to a sale or transfer of the subject property pursuant to a decree of foreclosure or any other proceeding in lieu of foreclosure. Such sale or transfer shall not relieve such property from liability for any assessment thereafter becoming due, nor from the lien of such subsequent assessment.

(e) The Housing Society and its subsidiaries shall upon demand of any person or organization furnish, for a reasonable fee, a certificate regarding the status of any member property as to liability for and the amount of any assessment. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

Comment to Section 107.

The provisions of this Section are based on the experience gathered in a study by the Urban Land Institute of the homes association. *Homes Association Handbook, Urban Land Institute*, Tech. Bull. 50 (1964). Chapters 12 through 19 of the Handbook are particularly relevant.

Subsection (a). Two types of assessments are authorized by this Section. Subsection (a) authorizes the Housing Society and its subsidiaries to levy *periodic* assessments to cover the cost of *regular maintenance* as defined in Section 102(a)(1). Subsection (b) authorizes *special* assessments to cover the cost of correcting violations of the bylaws. Such assessments, however, can be levied only against the non-complying property.

Subsection (a) requires that the maximum amount of the periodic assessment be set forth in the bylaws. Experience has shown, however, that the maximum should not be permitted to remain inflexible. Accordingly, Subsection (a) requires that the maximum amount of the assessment stated in the covenants be subject to increase in accordance with a formula set forth in the bylaws. A workable formula is set forth in F.H.A. and V.A. *Suggested Legal Documents for Planned Unit Development*, F.H.A. Form 1401, V.A. Form 26-8201, Covenants, Article VI, Sec. 3, (issued February, 1965).

In addition, Subsection (a) authorizes provision for change in the maximum by assent of a specified majority of the votes available to the properties affected. Matters which should be considered in drafting such a provision as well as a model form will be found in *Homes Association Handbook*, Urban Land Institute, Tech. Bull. 50, §§ 12.33 to 12.36, and Appendix F, Covenants, Article V, page 388 (1964). Finally, Subsection (a) authorizes change upon application to court--as a safety valve, in case inadequate flexibility is provided in the bylaws.

Subsection (b). Under Section 102(a)(5) the Housing Society and its subsidiaries may reserve the right to enter upon the properties to correct violations of its bylaws. This subsection authorizes a special assessment against the non-complying property to defray the cost of the work done. The Housing Society or its subsidiary must give the owner an opportunity to correct the violation himself.

Subsection (c). This subsection creates a charge and continuing lien on each of the member properties for any periodic or special assessments levied against such property. The legal significance of this language is explored in *Homes Association Handbook, Urban Land Institute*, Tech. Bull. 50 §§ 23.3 to 23.8 (1964). The lien is expresaly postponed to mortgages under Subsection (d). Each assessment is also made a personal obligation of the person who was the owner of the property at the time when the assessment was levied. For the legal significance of this language see *Homes Association Handbook supra*, §§ 23.6 to 23.8. Recognizing that a special assessment may be levied for non-compliance which is not the fault of the owner, but rather that of his tenants, a provision is added allowing the owner to secure a court order for contribution. The primary responsibility, however, rests on the owner as it does under all public codes.

Section 301(b) contains a special provision allowing the owner to avoid personal liability on any assessment by petitioning the court for the appointment of a receiver. See commentary to that Section.

Subsection (d). The continuing lien created by Subsection (c) is here made superior to all other liens except those for taxes and municipal assessments and mortgages. Only mortgages to finance acquisition,

construction or improvement of the property are excepted, however. A mortgage lender is entitled to protection against liens for assessments built up prior to foreclosure, but not for those becoming due thereafter. Thereafter, the lender occupies the same position as any other owner and there is no justification for any further exemption. See Comment to Section 101, Subsection (e) and to Section 306. There is authority for denying to the mortgage lender any priority over liens created to secure expenditures necessary to put buildings in compliance with public code requirements: Department of Buildings v. Philco Realty, 14 N.Y. 2d 291, 200 N.E. 2d 432 (1964). For the policy reasons explored in the Comment to Section 306, this Act does not undertake to postpone mortgages to that extent. However, note the special provisions of Section 307.

Subsection (e). If the recorded bylaws set forth the existence of a lien in the terms authorized by Subsection (c) - i.e. that it is a continuing lien covering all assessments thereafter levied by the Society- the legal significance of that language is that each assessment (at the very least, each regular, periodic assessment) becomes an equitable lien as soon as levied and no recordation of the lien is necessary to perfect it: Prudential Insurance Company v. Wetzel, 212 Wis. 100, 248 N.W. 791 (1933) (homes association assessment); Frank M. Ewing Co. v. Kraft Company, 22 Md. 21, 158 A. 2d 634 (1960); Heller v. Gate City Building and Loan Association, 75 N.M. 596, 408 p. 2d 753 (1965); Housing Mortgage Corporation v. Allied Construction, Inc., 374 Pa. 312, 97 A. 2d 802 (1953) (all three cases dealing with mortgages to secure future advances).

Subsection (e), therefore, becomes an imperative provision to protect purchasers and others who act on the security of the owner's good title.

ARTICLE II

SECTION 201. ORGANIZATION OF HOUSING SOCIETY: ARTICLES, BYLAWS, EXERCISE OF POWERS. Any three persons may incorporate a Housing Society and serve as its initial board of directors. The incorporators shall follow the procedure prescribed by [*refer to appropriate non-profit corporation law*] for incorporation, subject to the following:

(a) The articles of incorporation shall set forth only: (1) the name of the corporation; (2) that the corporation is organized pursuant to this act; (3) the address of its initial registered office; (4) the names and addresses of the persons who will serve as the initial directors; (5) the name and address of each incorporator.

(b) The powers of the Housing Society over a member property shall not become effective until its bylaws have been recorded against such member property as provided in Sections 202, 203 and 204.

(c) The bylaws shall contain a legal description, in accordance with accepted title standards, for all proposed member properties and shall set forth all of the powers and obligations of the Housing Society, of its subsidiaries, if any, and of its members in the form of agreements running with the land.

Comment to Section 201.

The procedures generally prescribed for incorporation of a non-profit corporation are to be followed except as set forth in this Section.

Subsection (a). Makes no change in the existing requirements for most jurisdictions. In a few jurisdictions, however, the law requires that the powers of

Preceding page blank

the corporation be set forth in the articles. This is not feasible in the case of a Housing Society, since it cannot exercise any powers over member properties until its bylaws are recorded. Subsection (a) makes clear that the *powers* of the corporation need not, must not, be set forth in the articles, but in lieu thereof the articles must refer this Act.

Subsection (b). Subsection (b) confirms that the powers over member properties can only be acquired through recorded bylaws.

Subsection (c). The bylaws must be couched in the form of covenants running with the land and, because they must be recorded, the description of the property involved must accord with accepted title standards.

SECTION 202. ADOPTION OF BYLAWS: PROCEDURE IN THE CASE OF CONSENTING OWNERS. When all of the owners of the proposed member properties have consented to subject their property to the bylaws of the Housing Society by subscribing the same in the manner required for the execution of a deed, the Housing Society shall record the bylaws against each such property. The recorder shall receive the same for record as if it were an easement granted in the land of the owner as grantor and the Housing Society as grantee.

Comment to Section 202.

This Section should be read together with the related provisions of Sections 205(a) and (b), 206 and 207(a). The position taken in this Section is that if the owner (as defined in Section 101(e)) consents to the bylaws, his tenants become bound by any provisions relating to them within thirty days of the recordation or of actual receipt of notice thereof, regardless of their consent (see Section 205(b)). Within the grace period, tenants are given standing to attack any provision of the bylaws or the power and right of the Housing Society to record the bylaws against such property (Section 206(a)(1)). However, Section 202 (the instant Section) clearly provides that the Housing Society has the power to record the bylaws upon consent of the owner and without reference to consent by the tenant and Section 205 clearly provides that the Society can enforce its bylaws against owners and tenants.

In effect, then, the tenant's action under Section 206(a), is limited to attack on the validity of Sections 202 and 206 and to claims that any power or regulation set forth in the bylaws is unauthorized by this Act.

The position taken as to tenants in this Section and the other Sections mentioned in this comment, is substantially the following: If a bylaw provision is authorized by this Act and is assented to by the owner, the tenant's sole recourse is against his landlord. In effect, this Act places the responsibility of determining whether consent to the bylaws injures the tenant upon his landlord. From a policy point of view, a provision requiring consent of the tenants would be wholly unworkable in most cases. Furthermore, the brunt of any obligations created by the bylaws will fall on the owner. This is true of assessments (Section 107) as well as of the typical health and building code regulations. Obligations imposed upon tenants in the Housing Society's bylaws are unlikely to exceed the minimum demanded by public code or already imposed by lease.

SECTION 203. ADOPTION OF BYLAWS: PROCEDURE IN THE CASE OF NON-CONSENTING OWNERS. When the owners of sixty percent or more of the living units in the proposed member properties have consented to subject their property to the bylaws of the Housing Society by subscribing the same in the manner required for the execution of a deed, the Housing Society may petition the local governing body to certify that the subjection of the remaining properties to the proposed bylaws and the jurisdiction of the Society will serve the public health, welfare and safety.

(a) Upon filing of the petition, the governing body may refer the petition for study and a report by the [planning commission]. The [planning commission] may hold one or more public hearings and shall submit its recommendations thereon to the governing body.

(b) Within sixty days of the filing of the petition, whether or not a report of the [planning commission] was called for or rendered, the governing body shall hold a public hearing at which interested persons shall have an opportunity to present their views. Notice of hearing shall be given as provided for [other public hearings] and in addition, notice shall be served personally, or mailed by registered mail to every

owner of the proposed member properties as their names and addresses appear on the real estate tax records and shall be posted upon each proposed member property at least ten days in advance of the hearing. The notice shall describe the purpose of the hearing and either, include the text of the proposed bylaws, or describe their content in general terms and state where the text of the bylaws may be obtained or examined.

(c) Upon conclusion of the hearing, if the governing body is satisfied that the subjection of the remaining properties to the proposed bylaws will serve the public health, welfare and safety, it shall certify the same to the Housing Society.

(d) Upon issuance of the certificate, the Housing Society may record the bylaws against each of the properties with the recorder of deeds. The recorder shall receive the same for record as if it were an easement granted in the land of the owner as grantor and the Housing Society as grantee.

Comment to Section 203.

Sections 203, 205, 206 and 207 set forth the procedures to be followed for applying the bylaws to non-consenting properties. Several questions arise about the proposal contained in these Sections. First, the consent which is made material in these Sections is that of ''owners'' as defined in Section 101(e). The position taken in regard to tenants and mortgagees is discussed in the comments to Section 202 and to Section 101(e). Second, there is a fundamental question about the authority for imposing restrictions upon non-consenting owners and the manner in which this is carried out in this Act.

The scheme of Sections 203, 205, 206 and 207 is to employ a combination of police power and eminent domain. Most of the restrictions and obligations imposed on the owner, tenants and others holding any interest in the property will fall well within the police power of the State as delegated to the local legislative body under this Act. The eminent domain power is only a branch of the police power and there is no reason why a combination of the two, authorizing the payment of compensation for certain kinds of regulation, cannot be employed. See Krasnowiecki, *Ownership and Development of Land*, 479-482 (1965). When a public regulation is invalidated on the grounds that it con-

stitutes a ''taking'' of property, this does not mean that the regulation is necessarily invalid. It may be invalid only because compensation is not provided. Indeed, if the regulation would promote the public health, safety and welfare, it is valid no matter how hard it presses on the property owner, provided that compensation is payable at some point-at the point where the regulation becomes a ''taking.'' A number of proposals have been made for combining regulation and compensation: see, Bosselman, *The Third Alternative in Zoning Litigation*, 17 Zoning Digest 73, 113(1965): Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U.Pa.L. Rev. 179 (1961).

The source of power for imposing the bylaws of the Housing Society upon non-consenting owners relied on, therefore, is a combination of police power regulation and police power eminent domain. The central provisions are found in this Section and in Section 207.

The approach taken in these Sections is not as novel as might be supposed. Until the matter was settled in 1926 by the Supreme Court in Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) there was considerable doubt that governments could zone property without compensation. The question was not whether regulation of land use was a proper function of government (within the general police power), but rather whether such regulation could be imposed *without compensation*. In 1915, therefore, Minnesota enacted a law which authorized zoning upon payment of compensation. That law is still on the statute books of Minnesota, although it has fallen into disuse because of the decision in Euclid, supra, which approved zoning without compensation. Minn. Stat. Ann. §§462.12 to 462.16 (1963). The constitutionality of the Minnesota statute was upheld in State v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920).

With minor changes and innovations, the approach taken in this Section and Sections 205, 206 and 207 is modelled upon the Minnesota statute. One significant feature of the Minnesota statute is that the restrictions are imposed upon petition of 50% of the owners of the affected area. In other words, the procedure for imposing the zoning restrictions is the same as that provided for in Section 203 (except for the percentage of consenting owners involved). The proposed

procedure raises, of course, the question of unlawful delegation of legislative powers to a private group.

The objection of unlawful delegation. This objection applies only when private citizens are given the power to legislate. "The legislature must decide what the law shall be, and an act which vests any person or authority with arbitrary discretion to determine what the law shall be in a particular situation is invalid." People v. City of Chicago, 413 Ill. 315, 109 N.E. 2d 201 (1952). Thus an Illinois statute which provided that the legislature *shall* change the name of a street when sixty percent of the property owners on the street request the change was held unconstitutional. People v. City of Chicago, supra. The statute left the legislature no choice but to act in accordance with the request. The change became mandatory as soon as sixty percent of the owners requested it. The legislature was left no discretion to refuse. The Illinois Supreme Court said, "However, it is also recognized that the ultimate operation of a law *may* by its own terms be made to depend upon a contingency, such as an affirmative vote of the electors in a given district." People v. City of Chicago, supra at 204. Compare Eubank v. City of Richmond, 226 U.S. 137 (1912) Cusack Co. v. City of Chicago, 242 U.S. 526 (1916).

The Illinois Neighborhood Redevelopment Corporation Law, Illinois Statutes Annotated ch. 67 1/2, section 251 to 292 (1965), authorizes renewal by a private corporation under a procedure very similar to that set forth in Section 203. The private corporation prepares and submits a proposed development plan for a slum neighborhood to a public agency - the Redevelopment Commission. After a public hearing on the plan, the Redevelopment Commission may approve it if the statutory standards are met. Upon approval of the plan, the Commission is to issue to the Corporation a certificate that the acquisition of property by it is necessary and convenient for the purposes of the act. Before a condemnation proceeding may be instituted by the Corporation, it must again seek the approval of the Commission. The application for approval must contain proof that sixty percent or more of the property in the neighborhood has been purchased, or that the owners of sixty percent or more of the land in the neighborhood have agreed to be bound by the terms and conditions of the development plan as to themselves

and their property. Illinois Statutes Annotated ch. 67 1/2, section 292 (1965). If the Commission determines that all of the statutory conditions have been met, then it shall issue a certificate approving the commencement of the proposed condemnation proceedings.

The Illinois Supreme Court in an opinion by Justice Schaefer uphelf the constitutionality of the Neighborhood Redevelopment Corporations Law. In answer to the argument that the statute was an unlawful delegation of legislative power, the court said:

> What the General Assembly has done is authorize redevelopment corporations to exercise the right of eminent domain upon certain prescribed conditions. In so providing, the legislature has not delegated its power to make the law. The legislature has made the law, has provided for the creation and regulation of Redevelopment Corporations, has provided what powers such corporations may and may not exercise, and has provided that they may exercise the the power of eminent domain upon certain prescribed conditions. It is settled that the legislature may lawfully enact a law, the operation of which depends upon a contigent event. This court has stated that nothing is better settled than that the operation and even remedial character of a perfect and complete law may, by virtue of limitations contained in the law itself, based upon contingent extrinsic matters, be enlarged, diminished, or wholly defeated. Such laws, though adopted absolutely and perfect in all their parts, yet by their limitations they are applicable to a hypothetical condition of things only, and which may or may not ever happen. That it is perfectly competent for the legislature to pass such laws is shown by long legislative experience, and a decided weight of judicial authority. Zisook v. Maryland-Drexel Neighborhood Redevelopment Corp., 3 Ill. 2d 570, 121 N.E. 2d 804, 809 (1954).

SECTION 204. ADDITIONS TO MEMBER PROPERTIES. The Housing Society may extend its bylaws or adopt new bylaws for and extend its jurisdiction and membership to additional properties as follows:

(a) If the extension of the bylaws or the proposed new bylaws have the assent of all of the owners of the

owners of the proposed addition as provided in Section 202, the addition may be made as provided in Section 202.

(b) If the extension of the bylaws or proposed new bylaws have the assent of sixty percent of the owners of the proposed addition as provided in Section 203, the addition may be made as provided in Section 203.

(c) Provided that no addition shall be made under Subsection (a) or Subsection (b) if it will substantially reduce the enjoyment of common properties and services by the existing members of the Society or substantially increase the burden of obligations placed upon them under the bylaws.

Comment to Section 204.

In the course of its existence, the Housing Society may receive requests for inclusion of additional properties within its jurisdiction from the owners residing in such proposed addition. Furthermore, low cost housing projects sponsored by the Society must be brought within the scheme of its bylaws.

Subsection (a). If all of the owners *in the proposed addition* consent to the bylaws, the addition can be made as provided in Section 202. The proviso in Subsection (c), however, prohibits the addition if it will adversely affect the existing membership of the Society.

Subsection (b). If less than all of the owners in *the proposed* addition consent, the addition cannot be made except as provided in Section 203.

SECTION 205. EFFECT OF BYLAWS. Unless otherwise specifically provided in the bylaws, when recorded against each member property, as provided in Section 202 and 203, the bylaws shall bind each member property, its owners and tenants, present and future and shall be enforceable by the Housing Society and by its members against each other by any proceeding at law or in equity regardless of whether the obligation sought to be enforced calls for an affirmative act or merely requires forbearance, subject to the following:

(a) Persons who are owners and tenants at the time of recordation and who have assented to the bylaws shall become bound as of the time of recordation.

(b) Persons who are owners and tenants at the time of recordation and who have not assented to the bylaws shall become bound within thirty days of the time of recordation or within thirty days of receiving actual notice thereof, whichever comes later.

(c) Persons who become owners and tenants after the date of recordation shall be bound from the date of recordation. But any such tenants who have no actual or record notice of the bylaws may treat any obligation or restriction imposed on them by the bylaws which differs from that imposed under the lease as a ground for rescinding the lease.

Comment to Section 205.

This Section confirms the effect of the bylaws as covenants running with the land by providing that, when recorded, they shall bind each member property, its owners and tenants in favor of the Society and mutually among themselves and shall be enforceable by civil proceeding in law and in equity. The language about affirmative obligations is designed to dispel any doubt on this score existing in the covenant field: see *Homes Association Handbook, Urban Land Institute*, Tech. Bull. 50, §§ 23.1 to 23.9 (1965).

Subsections (a), (b) and (c) govern the timing and binding effect of the bylaws. Subsection (a) is self-explanatory.

Subsection (b). The grace period allowed in this Subsection, is designed to give the non-consenting owner or tenant time to file the action authorized in Section 206. So far as it relates to non-consenting tenants, the provisions of this Subsection and Section 206 have been discussed in the comment to Section 202.

The provisions of this subsection and of Section 206 have special significance in the case of non-consenting owners. When read together with Section 207, authorizing claims for compensation, the procedure mirrors the procedures of a modern condemnation law such as the Pennsylvania Eminent Domain Code of 1964, Pa. Stat. Ann. tit. 26, §§ 1-101 to 1-903 (Supp. 1966).

The modern codes, separate the claim for compensation from the other objections an owner may wish to raise. Normally, as in the Pennsylvania Code, the

owner is given a limited time to challenge the power or right of the condemning authority to take his property. In Pennsylvania, all substantive and procedural objections to the condemnation must be raised within thirty days after being served with notice of the condemnation. If not raised within that time, they are deemed waived. Pa. Stat. Ann. tit. 26, § 1-406 (Supp. 1966). Thereafter, the owner is entitled only to litigate the question of compensation. The proceeding to secure compensation can be commenced by the owner at any time after the condemnation. Pa. Stat. Ann. tit. 26, § 1-502 (Supp. 1966). The owner is entitled to commence the proceeding for compensation even though the government agency does not recognize that it has taken his property: Griggs v. Allegheny County, 402 Pa. 411, 414, 168 A 2d 123, 124 (1961) reversed on other grounds 369 U.S. 84 (1962). Such a proceeding is generally known as an ''inverse'' condemnation proceeding and the owner's right to utilize it is well recognized: see, Causby v. United States, 60 F. Supp. 751, 757, (Ct. Cl. 1945) reversed on other grounds, 328 U.S. 256 (1946); Note, Eminent Domain, Rights and Remedies of an Uncompensated Owner. 1962 Wash. U.L. Q. 210, 232-236.

In effect, Subsection (b) of this Section, when read together with Section 203, 206 and 207, adopts the following approach: (1) The Housing Society's bylaws are recorded against non-consenting owners as a result of independent public action, after a hearing, Section 203; (2) this public action is *presumptively* regulatory in nature–an exercise of regulatory police power. For this reason, this Act does not require the public to commence condemnation proceedings against the non-consenting owners; (3) however, in case any bylaw is alleged to have exceeded the regulatory police power, a procedure is provided for the non-consenting owner under which he can claim compensation. Subsection (b) delays the effective date of the bylaws long enough to allow the owner to bring the action authorized in Section 206. By that action, the owner can raise all of his substantive and procedural objections to the bylaw. Section 207 gives him the right, in this proceeding, or in a separate proceeding to claim compensation. The Section 207 proceeding can be commenced at any time (within a reasonable time) of the recordation of the bylaw, or notice (whichever comes later) or it may be commenced within

a reasonable time after the owner loses his action under Section 206. In effect, the owner is given all of the protections of a modern ''inverse'' condemnation proceeding.

Subsection (c). This Subsection deals with the position of those who become owners and tenants of the property *after* the bylaws have been recorded. It is not surprising that subsequent owners are bound since they have record notice. Note, however, the definition of ''owner'' in Section 102(e). Under that definition a mortgagee is not an owner until he takes possession of the property at foreclosure or any proceeding in lieu of foreclosure. The mortgage lender under a mortgage outstanding at the time of recordation of the bylaws, therefore, is not an owner, but he may become an owner through foreclosure–in which case, this Subsection says that he is bound by the bylaw. Yet under Sections 202 and 203, the mortgage lender is given no opportunity to consent or not to consent to the bylaws nor is he required to be given notice. As noted in the Comment to Section 102(e), the justification for this treatment of him lies in the fact that all liens for assessments accumulated *prior to foreclosure* (not thereafter) are expressly postponed to the mortgage, Section 107(d) and see Section 306(a). It may be objected, however, that, although free from liens built up prior to foreclosure, the mortgage lender gets at foreclosure property encumbered by the bylaws and subject to all future assessments and liens, Section 107(d). The position taken in this Act is that he is not entitled to any protection against the diminution in the value of the property (if any) for the following reasons: (1) if his borrower has consented to the bylaws, his claim, if any, should be against his borrower for impairing the security; (2) if the bylaws have been imposed as a result of public action, this is risk which he carries in regard to zoning. Lenders, generally, have no standing as such to contest zoning and their normal recourse is to prevail upon their borrower to bring the action in his name. The same reasoning, it is submitted, goes for the actions authorized by Sections 206 and 207; (3) finally, the effect of the neighborhood scheme envisaged in this Act should be to protect and increase the value of the neighborhood properties. To allow the lender to participate in a Section 202 or a Section 203 proceeding would create procedural chaos.

Subsection (c) applies also to subsequent tenants. Here it is more difficult to rely on record notice. For this reason, the position taken is that the tenant is bound, but if he has had no notice at the time of entering into the lease, he can treat this as a ground for rescision. The burden of giving notice is placed on the landlord. Furthermore, as noted in several earlier places in the comments to this Act, the bylaws of the Housing Society are not likely to do more than to confirm what are already the tenant's obligations under a public code or under the lease.

SECTION 206. OBJECTIONS TO BYLAWS: ACTION IN COURT. **Within thirty days after the bylaws are recorded or within thirty days after receiving actual notice thereof, any owner or tenant who was an owner or tenant of the property at the time when the bylaws were recorded against it and who has not consented thereto may file in the court of [insert court of appropriate jurisdiction] an action to set aside the bylaws as to such property and for an order to strike the bylaws from the record of such property.**

(a) The action provided for herein shall be the exclusive method of challenging:

(1) Any provision of the bylaws or the power or right of the Housing Society to record and enforce the bylaws against any property;

(2) The decision of the local governing body to issue a certificate pursuant to Section 203 or the power or right of the local governing body to issue the same;

(3) The procedure followed by the Housing Society or the local governing body for the adoption, approval or recording of the bylaws.

(b) All objections shall be raised at one time in one pleading.

(c) A copy of the complaint shall be served upon the Housing Society, the local governing body and all remaining owners and tenants of the property involved. All such persons shall be proper parties to the proceeding.

(d) All issues in the action shall be tried to a court without a jury, and the court may make such preliminary and final orders and decrees as justice

shall require, including an order to strike the bylaws from the record of the property involved.

Comment to Section 206.

The theory of this Section has already been discussed in the Comment to Subsection (b) of Section 205. See also Comment to Section 203.

Subsections (a), (b), (c) and (d). These provisions follow closely the provisions of the new Pennsylvania Eminent Domain Code, 1964, relating to the procedure for raising substantive and procedural objections to condemnation: Pa. Stat. Ann. tit. 26, § 1-406 (Supp. 1966).

As noted in the comment to Subsection (b) of Section 205, this Act does *not* recognize that the imposition of the Housing Society's bylaws against the non-consenting owners constitutes a ''taking.'' The Act presumes that the imposition of the bylaws is an exercise of the public *regulatory* police power. Section 207 represents merely a safety valve to cover those cases where an owner can show that the imposition of the bylaws exceeds the regulatory power. See Section 207(b).

No power of government whether it be to regulate or to condemn, however, can be exercised for purposes which do not further, are unrelated to, the public health, welfare and safety. None can be exercised without due process. In eminent domain cases, the first limitation on the power of government is couched in terms of ''public purpose'' rather than in terms of ''public health, safety and welfare.'' But if different results are obtained under these two formulations, that difference is an accidental result of the fact that compensation is payable in one case but not in the other. The courts are instinctively less concerned about excess of power when compensation is payable than they are when it is not. But the principle is the same, only the instinct of the courts is different.

Section 206 requires the owner to raise all of his objections in a single proceeding at one time. The wording of Subsection (a)(1), (2) and (3) is intended to be b-oad enough to include every conceivable objection both constitutional and statutory, both substantive and procedural, legally available to him.

The owner is free to mix in with his action under this Section a claim for compensation under Section 207 (see Section 207). His failure to claim compensation in a proceeding under 206, does not foreclose a claim for compensation later in a separate proceeding under Section 207. It is true that if he elects not to claim compensation in a Section 206 proceeding, the court will not know how to indulge its instinct on the question of excess of government power. This is a matter of tactics for the owner to ponder.

Although Subsection (a) provides that the action authorized by Section 206 is the owner's exclusive method for challenging the imposition of the bylaws on substantive and procedural grounds both constitutional and statutory, a decision against him in this proceeding does not necessarily foreclose all of the issues forever. For example, a decision that the imposition of the bylaws is within the regulatory power of government will have only such res-judicata effect as is customarily accorded a decision in zoning. If a regulation is found to be valid in 1967, this does not mean that it will continue valid forever. The courts have inherent power to review the validity of restrictions on the grounds that there has been a material change in circumstances. There are few cases involving this principle in zoning, largely because once the zoning is held valid against a challenge, the owner generally develops his land as required by the zoning and so there is little occasion to reconsider the zoning until the structures are torn down at which point the local public authority may be willing to rezone or the occasion is one of urban renewal. But the courts have reviewed and lifted private covenants on this principle and they may be expected to employ this power more widely in the case of the bylaws of the Housing Society-at least in the case of owners who did not consent to their imposition. See, Downs v. Kroeger, 200 Cal. 743, 354 P. 1101 (1927) Krasnowiecki, *Ownership and Development of Land*, 452-462 (1965).

Furthermore, the bylaws are subject to amendment in the same manner as provided for their imposition. Section 208.

SECTION 207. COMPENSATION. Within a reasonable time after the bylaws are recorded or within a reasonable time after an adverse decision is rendered against him in an action

under Section 206, or as part of such action, any owner or tenant who was an owner or tenant of the property at the time when the bylaws were recorded against it and who has not consented thereto, may petition the court of [insert same court as in Section 206] for an award of compensation from [insert appropriate agency of the local government] as hereinafter provided:

(a) No right of compensation hereunder shall accrue to any tenant whose landlord has consented to the bylaws and the sole recourse of such tenant shall be against the landlord.

(b) The proceeding for compensation shall be governed by [refer to appropriate eminent domain law] provided that no compensation shall be paid for any loss occasioned by the imposition of any bylaw if the bylaw is within the power of the local government to impose as a public regulation or order in the interest of public health, welfare and safety without compensation therefor.

Comment to Section 207.

The theory of this Section is discussed in the comments to Subsection (b) of Section 205 and Section 206.

Subsection (a). The reasons why the tenant is denied compensation are discussed in the comment to Section 202.

Subsection (b). See comment to Section 206.

SECTION 208. AMENDMENT OF BYLAWS. The bylaws of the Housing Society (including all of its subsidiaries) shall not be subject to amendment except as follows:

(a) If all of the owners of the living units in the member properties consent thereto as provided in Section 202, the amendment may be made and shall take effect as provided for the adoption of the bylaws under Section 202 and 205. Provided that no amendment shall be made under this Subsection if compensation has been paid under Section 207 in regard to any property which is included in the amendment;

(b) If the owners of sixty percent or more of the living units in the member properties consent thereto as provided in Section 203, or in cases falling within the proviso of Subsection (a), the amendment may be

made and shall take effect as provided under Section 203 and 205.

Comment to Section 208.

The provisions for amendment of bylaws in this Section are more liberal than those found in most covenants. In effect, the bylaws may be changed by agreement of sixty percent of the owners with the assent of the local governing body. Furthermore, as indicated in the comment to Section 206, the bylaws will be subject to review by the courts through their inherent power to remove private or public restrictions which have become outdated.

The purpose of the proviso in Subsection (a) is to prevent amendment of the bylaws with regard to any property which has received compensation for the imposition of the bylaws under Section 207 except with the local government's consent. Such an amendment is then brought under Subsection (b) and the procedures of Section 203.

ARTICLE III

SECTION 301. RECEIVERSHIP; GROUNDS FOR PROCEEDING. The Housing Society, its subsidiaries or any one or more members may petition the court of [insert court of appropriate jurisdiction] for an order directing the appointment of a receiver to collect the rents for any multi-family building or any rented living units and to apply them as directed by the court.

(a) The court may appoint a receiver on the grounds that the owner has failed to provide adequate living conditions therein as required by the bylaws of the Housing Society or as required by any public code, regulation or order; or that he has failed to pay any assessment or discharge any lien for work done by the Society to provide the same.

(b) In an action brought by the Housing Society or any of its subsidiaries to collect an assessment pursuant to Section 107 by a personal money judgment against the owner, upon motion filed in writing by the owner, the court may after a hearing appoint a receiver in lieu of granting a personal money judgment against him.

Comment to Section 301.

As noted in the comment to Section 100, the purpose of the Model Law is to put neighborhood conservation and improvement in the hands of a neighborhood organization and to focus upon it a whole range of techniques and remedies needed to do the job. Receivership is one of those remedies.

The provisions of Article III are modeled upon the receivership laws of Connecticut, Illinois and New York and particularly on that of New York: see, Conn. Stat. Ann. §§ 19-347a to 19-347h (Supp. 1966); Ill.

Stat. Ann. ch. 24 § 11-31-2 (Supp. 1966); N.Y. Actions and Proceedings Law, Article 7-A, §§ 769 to 782 (Supp. 1966).

In Connecticut and Illinois receivership proceedings can be instituted only by the appropriate public official. As a result, very little was done under either law until various tenant groups put pressure on the public officials by instituting rent strikes and proceedings in equity. Equity has inherent power to appoint a receiver when this is necessary to protect the property rights of the plaintiff to the action. See, Pomeroy, Equity Jurisprudence, §§ 1330 to 1335 (5th ed. 1941). Traditional theory, however, has it that a public health or housing code does not create any private rights: Kearse v. Spaulding, 372 Pa. 306, 94 A. 2d 44 (1953). At the same time, there has been some doubt whether the public authority itself may enforce its codes in equity. These doubts are fast dying under the modern urban pressures. But if equitable intervention has been in doubt in connection with public codes, there should be no doubt as to the power of equity to intervene to enforce and protect the obligations and rights of the members of the Housing Society under the bylaws. The recordation of the bylaws creates a private covenant scheme and traditionally private covenants are enforceable in equity even if nothing were said to this effect in Section 205. For this reason, Section 301 extends the receivership remedy broadly to the Housing Society and to any one or more of its members. In this regard it goes further than the New York statute which requires one third of the tenants of a multiple dwelling to join in the action: N.Y. Actions and Proceedings Law, Article 7-A, § 770. Furthermore, Section 301 authorizes receivership for any rented living unit whether in a multifamily building or not.

Subsection (a). The New York and Connecticut Acts, limit the grounds for receivership proceedings to list of health and safety reasons. This caution is out of place in this Act for the following reasons: (1) as against a consenting owner, the power of the court to appoint a receiver because of a violation of the Housing Society bylaws rests on the traditional equity power to protect private property rights created by agreement; (2) as against a non-consenting owner although the private property right was created by public police power action, (see Section 203), it

seems absurd to differentiate between the bylaws as if some were more fully supported by the police power and others were less so. Under the language of Subsection (a) the court is given discretion to import its own limitation on this score-since the subsection plainly states that the ground is failing to provide adequate living conditions.

Subsection (b). This subsection is alluded to at the end of the comment to Section 107(c). If the owner of rental building believes that the level of maintenance prescribed by the bylaws is uneconomic for him, he can avoid personal liability on the assessments by petitioning the court to appoint a receiver and so ultimately forfeit his equity in the building (if he is right that the building cannot sustain the required level of maintenance). The theory of this provision is that whereas no one can be forced to continue and increase his investment in a loosing venture, no one is entitled to retrieve an equity which exists only by virtue of the fact that there are people who have no choice except to live in squalor. See, Ademec v. Post, 273 N.Y. 250, 7 N.E. 2d 120 (1937), compare Central Savings Bank v. New York, 279 N.Y. 266, 18 N.E. 2d 151 (1938), cert. den. 306 U.S. 661 (1938) with Department of Buildings v. Philco Realty, 14 N.Y. 2d 291, 200 N.E. 2d 432 (1964).

SECTION 302. NOTICE: TIME AND MANNER OF SERVICE. Upon filing of a complaint pursuant to Section 301(a) or prior to a hearing upon a motion by the owner pursuant to Section 301(b), a clerk of court shall issue summons to every owner, mortgagee and lienor of record specifying the time and place of the hearing. The summons together with a copy of the complaint or motion shall be served in the manner prescribed by the law of this state for service in civil actions. Proof of service of summons and complaint or motion shall be filed with the court before hearing thereon.

Comment to Section 302.

Notice of the complaint and service of summons is made on all owners, mortgagees and lienors of record as under N.Y. Actions and Proceedings Law, Article 7-A, § 771 (Supp. 1966). The New York law requires notice to mortgagees and lienors of record in response to the decision in Central Savings Bank v. New York, 279 N.Y. 266, 18 N.E. 2d 151 (1938) cert. den. 306

U.S. 661 (1938) as explained in Department of Buildings v. Philco Realty, 14 N.Y. 2d 291, 200 N.E. 2d 432 (1964). The New York law puts the receivership lien ahead of any existing mortgage or other liens (except liens for taxes and municipal assessments). For the policy reasons explored in the comment to Section 306, this Model Law does not put the receivership lien ahead of existing mortgages. Nor does it postpone existing mortgages to the lien of any maintenance assessment. Section 107(d). However, only mortgages to finance acquisition, construction or improvement of the property are excepted. Other mortgages and liens are subordinated to the receivership lien. Furthermore, the receiver or anyone else entitled to his lien may petition the court to limit the priority of mortgages. Section 307. Lastly, a receivership represents a dramatic change in the control and possibly management of the property. For these reasons, it seems expedient to notify mortgage lenders and other lienors of record of the pendency of a receivership action.

SECTION 304. DEFENSES: BURDEN OF PROOF.

(a) In a proceeding under Section 301(a) if the court is satisfied that the appointment of a receiver is authorized on the facts alleged in the complaint, the court may appoint a receiver unless the owner, mortgagee or lienor of record establishes:

(1) That the facts alleged in the complaint are untrue or that appointment of a receiver on such facts is unauthorized; or

(2) That the owner is about to repossess the living unit in question for his own occupancy as a dwelling; or

(3) That the owner has in good faith contracted to sell the living unit in question for immediate occupancy by the purchaser as a dwelling; or

(4) That the owner is about to repossess the living units in question for the purpose of permanently withdrawing them from the housing market. But this defense shall not be available when receivership is sought solely for the purpose of collecting an unpaid assessment.

(b) In a proceeding under Section 301(b) upon motion by the owner, the court may relieve the owner of the

personal obligation upon an unpaid assessment by granting the motion to appoint a receiver notwithstanding the objections of any mortgagee or lienor of record unless such mortgagee or lienor establishes that the assessment is not due or is unauthorized.

Comment to Section 304.

This Section is modeled upon N.Y. Actions and Proceedings Law, Article 7-A, § 775 (Supp. 1966). Its purpose is to put the burden of establishing lack of authority (including lack of factual support) for the appointment of a receiver on the owner, mortgagee or lienor of record.

Subsection (a). This Subsection covers the cases in which the owner is being put into receivership against his wishes. Subsection (b) covers the case where the owner desires a receivership as a way of avoiding personal liability upon an assessment (see comment to Section 301(b)). But in all such cases, the owner must establish his lack of liability, in other words the burden is on him. The justification is that the owner is the only person who has the available proof on this issue. Whether the owner may be required to come forward with evidence disproving the complaint's allegations as to the physical condition of the buildings is another matter. But the order appointing the receiver will authorize him only to remedy the alleged deficiencies. If there are none, there will be nothing that the receiver can do and the court is bound to discharge him under Section 309.

Subsection (a)(1) provides that the court may appoint a receiver *on the facts alleged in the complaint* unless the owner, mortgagee or lienor establishes that the facts are untrue or that the receivership is not authorized on those facts. The owner, therefore, has the burden of disproving the facts alleged in the complaint or of showing that the receivership is unauthorized. ''Unauthorized'' will include all statutory and constitutional grounds for lack of authority. For example, under Section 301(a), receivership is authorized on the grounds that the owner has failed to provide adequate living conditions in his rental properties as required in the bylaws of the Housing Society or any public code, regulation or order. The owner may claim that receivership is unauthorized on the grounds that he is not responsible for the lack of

compliance–that there has been no failure on his part to provide the necessary conditions. Among the defenses which he might establish under this heading, would be that the failure is due to circumstances beyond his control and that he has done everything in his power to provide adequate living conditions. Note that under Section 107(c), the owner may petition the court for an order requiring the tenants to contribute to an assessment.

Under Section 301, any rented living unit may be put in receivership. Subsections (a)(2) and (3) allow the owner to avoid receivership where he can show that he is about to repossess the unit for his own occupancy as a dwelling or that he has contracted to sell the unit for immediate occupancy by the purchaser as a dwelling.

Subsection (a)(4) is dictated by the following considerations: Once the receiver is appointed, he will continue to hold the building on the rental market until the building is put in compliance with the bylaws. If the rentals will not sustain the required repairs and improvements, the receiver's lien may cut into the owner's equity (assuming he can raise the funds to cover the work from government and other sources against that lien). Ultimately, the owner may lose his land and buildings, and his equity in a foreclosure. These consequences are justifiable so long as the owner is not prepared to withdraw the building from the housing market. Subsection (a)(4) gives him the opportunity to withdraw. There are cases, of course, which sustain public regulation prohibiting withdrawal on emergency housing shortage grounds: Block v. Hirsh, 256 U.S. 135 (1921); Loab Estates v. Druhe, 300 N.Y. 176, 90 N.E. 2d 25 (1949). But it would be hard to argue that the bylaws of the Housing Society are a housing shortage measure. Although Subsection (a)(4) gives the owner an opportunity to avoid receivership by showing that he is about to withdraw the building from the housing market, it does not permit him to avoid the consequences of a receivership once the receiver is appointed. Furthermore, Subsection (a)(4) does not permit the owner to deprive the Housing Society of this technique for collecting unpaid assessments (second sentence).

Subsection (b). Subsection (b) extends the approach taken in Subsection (a) to the case where receivership

is sought by the owner to avoid personal liability on an assessment. The objecting mortgagee or lienor must establish that the assessment is not due or is unauthorized.

SECTION 305. ORDER APPOINTING RECEIVER. **The court may appoint the Housing Society or any other appropriate person as receiver. The order appointing the receiver may direct:**

(a) That the rents due on the date of the issuance of the order shall be deposited with the receiver and that all future rents shall be deposited with the receiver as they become due until such time as the receiver is discharged.

(b) That control and management of the property be transferred to the receiver and that the receiver carry out any and all works necessary to restore and thereafter maintain the living conditions upon the property in compliance with the bylaws of the Housing Society and with any public code, regulations or order.

(c) That the receiver apply the rents deposited with him to the cost of management and works performed by him in the order specified in Section 306.

Comment to Section 305.

Under Section 102(d) the Housing Society is authorized to act as receiver and to purchase the property at any proceeding to foreclose a receivership lien. Section 305 authorizes the court to appoint the Housing Society or any other appropriate person as a receiver. There is no sense in limiting the discretion of the court in this regard.

Subsections (a) and (c) are self-explanatory.

Subsection (b) authorizes the court to order that control and management of the property be transferred to the receiver. Current receivership laws are unclear on this point.

SECTION 306. RECEIVERSHIP LIENS; PRIORITIES; APPLICATION OF RENTS THERETO; POWER TO BORROW. **Upon appointment, the receiver shall record a copy of the court order together with a copy of this Section against the property. The recorder shall receive the same for record as if it were an easement granted in the land of the owner as grantor and**

receiver as grantee. Upon such recording, the receiver shall have a continuing lien securing all advances present and future for works performed by him in the discharge of his duties, as follows:

(a) The lien shall be superior to all other liens, whether prior or subsequent in time, except liens for taxes and municipal assessments and, subject to the provisions of Section 307, the lien of any mortgage given to finance the acquisition, construction or improvement of the land and buildings involved.

(b) The rents collected by the receiver shall be applied by him in the following order:

(1) First to the payment of any taxes, municipal assessments and mortgages, but only to the extent that the liens of these charges are superior to his lien pursuant to Subsection (a)

(2) Second to the payment for all works performed by him in the discharge of his duties.

(c) The receiver shall have power to borrow and to contract for labor and materials upon the credit of his lien and his right to rents. Any person who has made advances or has furnished labor or materials on the credit of his right to rents or of his lien shall be subrogated to all of the rights of the receiver thereto.

(d) The receiver or any person who is entitled to his rights, may institute a proceeding to foreclose the receivership lien at any time provided that the lien shall not be foreclosed unless the receiver or such person establishes that the rents to which he is entitled, if any, are insufficient, when applied in the order stated in Subsection (b), to discharge the amount of the lien within the next succeeding six months.

Comment to Section 306.

To put all parties dealing with the owner and occupants on notice of the receivership and of the priorities, it seems appropriate to require that the order of the court be recorded together with a copy of this Section.

Subsection (a). The New York and Illinois receivership laws subordinate all mortgages to the receivership lien (both those existing at the time the re-

ceivership law was enacted, and those given after enactment, whether before or after appointment of the receiver). Ill. State. Ann. ch. 24 § 11-31-2 (Supp. 1966); N.Y. Actions and Proceedings Law, Article 7-A, § 776 (Supp. 1966). The New York law, however, gives the receiver priority only as to rents. It was on this ground, among others, that the court in Department of Buildings v. Philco Realty, 14 N.Y. 2d 291, 200 N.E. 2d 432 (1964) distinguished Central Savings Bank v. New York, 279 N.Y. 266, 18 N.E. 2d 151 (1938) which held that the receivership lien could not be preferred to existing mortgages. (Both cases are unclear as to whether a distinction is to be made between mortgages preexisting the law itself and mortgages which while given after the law was enacted precede the appointment of a receiver.)

In any event, the decision in Subsection (a) to afford priority to certain mortgages (no matter when given) is based on policy considerations which are independent from the fact that the validity of a subordination remains unclear. A provision subordinating all mortgages to the lien of a receivership can only have one effect: it will dry up mortgage credit in run down areas and contribute to their deterioration. For this reason, Subsection (a) prefers the mortgage lender-provided his loan is to finance the acquisition, construction or improvement of the land and buildings. However, the preference is subject to the unique provision of Section 307 which would allow the court to limit the priority where the mortgage lender is claiming an unreasonable return. The purpose of the priority is to encourage respectable lending institutions to remain in the deteriorating areas, not to encourage the friendly loan shark.

Subsection (b). This subsection deals with the order of application of the rents. It goes without saying that any balance remaining must be turned over to the owner. Subsection (b)(1) continues the mortgage priority set up in Subsection (a). Contrary to the reasoning of the court in Department of Buildings v. Philco Realty, 14 N.Y. 2d 291, 200 N.E. 2d 432 (1964), it is little consolation to the lender to know that he has priority on the foreclosure if he is postponed on the current rentals. Foreclosure may never occur and the receivership may continue forever.

Subsection (c). Subsection (c) is designed to facilitate financing by the receiver by assuring anyone

who gives credit to the receiver of a right to the receivership lien.

Subsection (d). This Subsection authorizes foreclosure of the receivership lien at any point at which the receiver or anyone entitled to the lien (pursuant to Subsection (c)) can show that the rents expected over the next succeeding six months are insufficient when applied in the order stated in Subsection (b), to discharge the amount of the lien.

SECTION 307. PETITION TO LIMIT PRIORITY OF MORTGAGES. The receiver, or any person to whom the receiver has assigned his rights or who is entitled to his rights pursuant to Section 306(c), may, at the proceeding to foreclose a receivership lien or at any time after the appointment of the receiver and prior to foreclosure, petition the court of [insert court of appropriate jurisdiction] to limit the priorities given to any mortgage by Section 306.

(a) Service of summons together with a copy of the petition shall be made upon the mortgagee involved and shall be proved as provided in Section 301.

(b) At the conclusion of the hearing thereon, or in default of appearance by the mortgagee, if the court is satisfied that the return which the mortgagee has contracted for or which he has already received upon the loan (including service charges and discounts) is unreasonable giving consideration to the risks involved and the practices of lending institutions in general, the court may limit the priority accorded to the mortgage lien by Section 306(a) and the priority accorded to the mortgagee in regard to the rents by Section 306(b), to an amount which seems just and reasonable under the circumstances.

Comment to Section 307.

There is no comparable provision in any receivership law. As stated in the Comment to Subsection (a) of Section 306, the Model Law, unlike other receivership laws, gives priority to mortgages and does not postpone them to the receivership lien either at foreclosure or in regard to rents. The purpose is to avoid discouraging legitimate lending institutions from participating in deteriorating areas. This Section is designed to flush out the loan shark.

SECTION 308. LIABILITY. Unless the court in its order appointing the receiver provides otherwise, the receiver shall not be liable in any way for any injury caused to any tenant, guest, invitee, licensee or trespasser on the property which is subject to receivership and the owner of the property shall remain completely liable for any injury to any of the above as at common law while the property is in receivership.

Comment to Section 308.

This Section leaves liability for personal injuries with the owner unless the court orders otherwise. Compare, Conn. Gen. Stat. §§ 19-347d and 19-347e (Supp. 1966). Under normal tort principles, the liability will be placed on the person who is in control of the property or of the persons who cause the injury. The degree of control which the receiver will exercise in any case will vary with the terms of the court's order so it seemed advisable to leave the question of his liability to specific resolution by the court in the order appointing him.

SECTION 309. ACCOUNTING: DISCHARGE OF RECEIVER.

(a) During the pendency of his receivership, the receiver shall render such accounting and at such times as the court may direct in the order of appointment or as it may from time to time direct on its own motion or upon petition of any owner, mortgagee or lienor of record.

(b) The receiver shall be discharged upon rendering a full and complete accounting to the court:

(1) At such time as the court may direct in its order of appointment: or

(2) Upon petition of the receiver or of any owner, mortgagee or lienor of record, if it appears to the court that the purpose of the receivership has been accomplished or that the petitioner is ready and able to meet the obligations which justified the appointment of a receiver.

(c) Notice of any accounting or of any proceeding to discharge the receiver shall be given to all owners, mortgagees and lienors of record and to the Housing Society (if it is not the receiver). The notice, to-

gether with a copy of the account or petition to discharge the receiver shall be served as provided in Section 301.

Comment to Section 309.

The provisions of this Section are modelled on existing legislation.

Subsection (a). The receiver is required to render accounts at such times as directed by the court order. The court may order an accounting at any time on its own motion or upon petition of any owner, mortgagee or lienor of record.

Subsection (b). The court may discharge the receiver upon petition of the receiver, or of any owner, mortgagee or lienor on the grounds that the purpose of the receivership has been accomplished. Or the court may discharge the receiver upon a showing by the owner, mortgagee or lienor that he is ready and able to meet the obligations which justified the appointment.

Subsection (c). Notice of accounting or discharge of the receiver is required to be given as provided for the original petition to appoint the receiver.

ARTICLE IV

SECTION 401. CONDOMINIUM [HORIZONTAL] [UNIT] PROPERTY LAW: APPLICABILITY. In the exercise of its power to provide low or moderate cost housing, the Housing Society may subject any property owned or acquired by it to a condominium [horizontal] [unit] property regime pursuant to [refer to applicable condominium law] for the purpose of selling the living units therein to persons of low or moderate means. Notwithstanding any contrary provisions of [refer to applicable condominium law] a project undertaken by the Housing Society pursuant to this Section:

(a) Shall be governed by a subsidiary organization of the Housing Society as provided in Section 103 in lieu of a [condominium council] and the provisions of Articles I and II of this act regarding membership in the subsidiary organization and in the Housing Society, voting rights, board of directors and powers of the Housing Society and its subsidiaries shall be controlling.

(b) May include living units in detached, semi-detached, attached and multifamily structures and may, in the case of detached, semi-detached and attached housing, provide that each individual dwelling unit carries with it a fee simple title to the lot upon which it is situated, subject to such easements in favor of the organization as are necessary to carry out regular maintenance.

Comment to Section 401.

Article IV is designed to provide the foundations for a low cost housing program that is described in Krasnowiecki, *Use of Condominium for Low Cost Housing*, XVIII Virginia Law Weekly, 3/3/66. The proposal is reproduced, with a foreword by Senator Percy, at 113 Cong. Rec. S6642 90th Cong. 1st Sess. (1967).

A number of problems lie ahead of an *ownership* low cost housing program:

Financial Assistance. With the exception of the program authorized under Section 221(h), National Housing Act of 1934 (added by Section 310 Model Cities and Metropolitan Development Act, 1966, 80 Stat. 1255, 1268), all existing federal low cost housing programs are limited to rental or cooperative rental housing. Uniquely, 221(h) authorizes a rehabilitation and resale program offering below market interest mortgages to low income purchasers. The program is confined to *rehabilitated*, single-family, detached, semi-detached and row housing–i.e. it does not apply to new construction or to multifamily highrise. The program is of a "pilot" nature because total insurance authorization is only $20,000,000, (representing approximately 2,000 units). Furthermore, F.H.A. regulations have limited the individual mortgage amortization period to twenty years (instead of the full 40 years authorized under 221(h)). At the current below market interest rate of 3%, the monthly payments to principal and interest per $1,000 mortgage principal on a 20-year basis, are $5.52, or $55.20 on a $10,000 mortgage. In the city it is hard to find a per unit cost of less than $10,000. Adding a typical monthly cost of maintenance, utilities taxes and insurance of $35 to $55.20, the monthly housing cost obtainable under the 221(h) program comes to a minimum of $90.00–more than most low income purchasers can afford. To reach the low income groups, the ownership program would require some further subsidy.

Assuming that an ownership program is worked out so that low cost housing can be provided on a fee ownership basis, the condominium form of ownership appears ideally suited to the purpose. Krasnowiecki, *op. cit. supra.*

Deficiencies of Existing Condominium Laws. Fully a third of the condominium laws enacted to date require that the board of directors of the condominium be composed exclusively of unit owners: Ala. Code. Ann. tit. 47, § 286 (Supp. 1965); Conn. Gen. Stat. § 47-80 (Supp. 1966); Ga. Code Ann. § 85-1617(b) (Supp. 1966); Idaho Code Ann. § 55-1507(a) (Supp. 1966); Ill. Rev. Stat. ch. 30, § 318(a) (1966); Ind. Ann. Stat. § 56-1226(a) (Supp. 1966); Kan. Gen. Stat. Ann. § 58-3119(a) (Supp. 1966); Me. Rev. Stat. Ann. § 561

(Supp. 1966); Minn. Stat. § 515.19(a) (Supp. 1966); Mo. Rev. Stat. § 448.180 (Supp. 1966); Mont. Rev. Codes Ann. § 67-2321 (Supp. 1966); N.H. Rev. Stat. Ann. § 479-A: 18 (Supp. 1966); N.M. Stat. Ann. § 74-4 -19A (Supp. 1966); Ohio Rev. Code § 5311.17 (Supp. 1966); Wash. Rev. Code § 64.32.090(11) (Supp. 1966).

These provisions make impossible the arrangement proposed in Section 106 for the board of directors.

Furthermore, many of the condominium laws create a doubt whether (a) they are applicable to housing other than in multifamily highrise; and (b) if applicable to other forms of housing, all of the laws with the exception of Michigan's (Mich. Stat. Ann. § 26-50(a) (a) (Supp. 1966)) create a doubt whether the housing unit owners may own their own lot where this is practicable-e.g. where the condominium is composed of single family attached or semi-attached (townhouse) housing. The language of all of the condominium laws, with the exception of Michigan's *Supra*, suggests that the *land* covered by the condominium must be owned in common. This is unfortunate when applied to the single family townhouse. But the draftsmen of the laws had highrise housing in mind and there, of course, individual ownership of the land was impossible.

Mobility, Ease of Transfer. One of the disadvantages of home ownership is that resale is attended by enormous complications because of an archaic conveyancing system and title structure. The owner must enter into a contract of sale, he or his purchaser must secure a title search and title insurance and so forth. These burdens of home ownership could be greatly alleviated by providing new techniques of title assurance and financing of resale. The author is working on a proposal to employ modified version of the Torrens registration system-for projects which have gone through the eminent domain wringer.

Section 401 authorizes the Housing Society to create condominiums in subsidiary form (see Section 103). The Housing Society is authorized to use the existing condominium law, but in case of any conflict between the existing condominium law and the Model Housing Societies Law, the latter controls.

Subsection (a). This Subsection makes clear that a Housing Society's subsidiary condominium is governed as to vocing rights, board of directors and powers by this law rather than by the basic condominium law.

Subsection (b). Makes clear that the Housing Society condominium can apply to all types of housing (not only to highrise) and that, where practicable, the housing can be offered together with title to the lot (rather than requiring that all land be owned in common). It is modelled on Mich. Stat. Ann. § 26-50(a)(a) (Supp. 1966).